Supreme Court, U.S.
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07-336

In The
Supreme Court of the United States

NATIONAL WINE AND SPIRITS, INC.,
NWS MICHIGAN, INC.,
and NATIONAL WINE & SPIRITS, L.L.C.,

Petitioners,

v.

STATE OF MICHIGAN and
MICHIGAN BEER & WINE WHOLESALER ASSOC.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Michigan

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant certiorari, vacate the decision of the Michigan Court of Appeals, and remand this case for further consideration in light of *Granholm v. Heald*, 544 U.S. 460 (2005).

PARTIES TO THE PROCEEDINGS BELOW

There were no parties to the proceedings below other than those identified in the caption of this petition.

CORPORATE DISCLOSURE STATEMENT

Petitioner National Wine and Sprits, Inc. has no parent company and there are no publicly held companies that hold any of its stock. Petitioner NWS Michigan, Inc. is a wholly owned subsidiary of National Wines and Spirits, Inc. Petitioner National Wine and Spirits, L.L.C. is, in turn, a wholly owned subsidiary of NWS Michigan, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	14
THE COURT SHOULD GRANT THIS PETITION FOR CERTIORARI, VACATE THE DECISION OF THE MICHIGAN COURT OF APPEALS, AND REMAND FOR CONSIDERATION IN LIGHT OF *GRANHOLM v. HEALD*	14
CONCLUSION	22
APPENDIX	App. 1 – App. 68

TABLE OF AUTHORITIES

Page

CASES

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 10

Frishett v. State Farm Mut. Automobile Ins. Co., 378 Mich. 733 (1966) 17

Granholm v. Heald, 544 U.S. 460 (2005) ..... *passim*

Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963) 15

Lawrence v. Chater, 516 U.S. 163 (1996) 21

New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988) 21

North Dakota v. United States, 495 U.S. 423 (1990) 15

Peoples Super Liquor Stores, Inc. v. Jenkins, 432 F. Supp. 2d 200 (D. Mass. 2006) 18

Southern Wine and Spirits of Texas, Inc. v. Steen, 486 F. Supp. 2d 626 (W.D. Tex. 2007) 18

Stutson v. United States, 516 U.S. 163 (1996) 21

Williams v. Amerisure, Inc., 607 N.W.2d 78 (Mich. 2000) 16

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const., Article I, Section 8 2

Mich. Comp. Laws § 436.1111(13) 4

Mich. Comp. Laws § 436.1205 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Mich. Comp. Laws § 436.1307(1) 3

Mich. Comp. Laws § 436.1601 ..... 2, 3, 19

SB 1171 (S03) (1996) 4

OTHER AUTHORITIES

R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (8th ed.2002) 16

PETITION FOR A WRIT OF CERTIORARI

Petitioners, National Wine & Spirits, Inc., NWS Michigan, Inc., and National Wine and Spirits, L.L.C., respectfully petition for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case, and ask that the Court grant the writ of certiorari, vacate the decision of the Michigan Court of Appeals, and remand the case for further consideration in light of *Granholm v. Heald*, 544 U.S. 460 (2005).

OPINIONS BELOW

The March 25, 2004 opinion of the Michigan Court of Appeals (App. 1-14) is unpublished, as are the oral rulings of the Circuit Court for the County of Ingham (App. 59-68). The Order of the Michigan Supreme Court vacating its grant of leave to appeal, together with the accompanying dissents (App. 29-33), are published at 723 N.W.2d 834 (2006). The Order of the Michigan Supreme Court denying petitioners' motion for reconsideration, together with the accompanying dissents (App. 15-28), are published at 729 N.W.2d 234 (2007).

JURISDICTION

The judgment of the Michigan Court of Appeals was entered on March 25, 2004. The Michigan Supreme Court initially granted leave to appeal on January 20, 2006, but later vacated its order and denied leave to appeal on November 29, 2006. The Michigan Supreme Court then denied a timely motion for reconsideration of that order on April 11, 2007. On July 3, 2007, the Honorable John Paul

Stevens extended the time for filing a petition for a writ of certiorari until September 10, 2007. No. 07A8.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 8 of the United States Constitution provides that "The Congress shall have power to * * * regulate commerce * * * among the several states."

The following portions of Michigan Liquor Control Act are reproduced at App. 36-44:

Mich. Comp. Laws § 436.1205

Mich. Comp. Laws § 436.1601

INTRODUCTION TO STATEMENT

In *Granholm v. Heald,* 544 U.S. 460 (2005), this Court struck portions of certain Michigan liquor statutes as violating the Commerce Clause because they provided benefits exclusively to in-state residents. This case presents a similar challenge to a related portion of Michigan's liquor statute that allows in-state wine wholesalers to sell thousands of brands of wine that similarly situated out-of-state wine wholesalers are forbidden to sell. This Court's decision in *Granholm* bears directly on this matter, but no Michigan court has yet addressed the impact of *Granholm* on this case. The highest Michigan court to consider this case on its merits – the Michigan Court of Appeals – issued its decision prior to this Court's decision in *Granholm*, and the Michigan Supreme Court ultimately denied leave to appeal. Petitioners respectfully ask that this

Court grant this petition, vacate the decision of the Michigan Court of Appeals, and remand the case for further consideration in light of *Granholm*. In the alternative, should Respondents contend that this case is materially different from *Granholm*, petitioners ask that the Court grant certiorari to address the important Commerce Clause issues presented here.

STATEMENT

1. Since the repeal of Prohibition, Michigan law has strictly regulated the distribution of wine through a "three-tier system." See *Granholm*, 446 U.S. at 468-469. This system enforces stark separation between suppliers, wholesalers and retailers. *Ibid.* With respect to the wholesaling function, suppliers grant wholesalers a sales territory within which the wholesaler may distribute specified brands of wine. These can be exclusive territories to sell that brand within the specified sales territory or the supplier may "grant the right to sell a specified brand or brands in a sale territory to more than one wholesaler." Mich. Comp. Laws Ann. § 436.1307(1). The practice of allowing more than one distributor to wholesale in the same sales territory is known as "dualing."

Whether a wholesale territory is exclusive or dualed, Michigan law requires that any wine wholesaler hold a Michigan wholesale license, and it *forbids any nonresident from obtaining a license to be a wine wholesaler.* Mich. Comp. Laws Ann. § 436.1601. In the case of a corporation, a license may only be issued "if all stockholders of the corporation have resided in this state for not less than 1 year immediately preceding the issuance of the license." Mich. Comp. Laws Ann. § 436.1601.

2. In 1996 Michigan overhauled its system for distributing "spirits" (which has always been distinct from the three-tier system regarding wine).[1] Previously, the State itself had held title to, warehoused and delivered all spirits, but the 1996 legislation privatized the distribution of spirits by having the State appoint Authorized Distribution Agents ("ADAs") to warehouse and distribute spirits. These ADAs are paid by the State on a per-case basis to act as the State's agents in this endeavor. ADAs function only in the area of spirits – wine continues to be regulated through the three-tiered system.

As first proposed, the spirit-privatization legislation included an absolute prohibition on the ability of ADAs to wholesale wine in competition with existing wine wholesalers. SB 1171 (S03) (1996). This prohibition was designed in response to concerns about the potential for ADAs to secure significant economies of scale by loading wholesale wine on the trucks they were already using to distribute spirits. There was a fear that this practice could threaten the competitive viability of existing wine wholesalers who were, as a matter of law, exclusively in-state residents. The original bill's prohibition on all ADAs participating in the wholesale wine market was across the board: no distinction was made between in-state and out-of-state ADAs or between those ADAs that were in-state residents as of a specific date and those ADAs that were out-of-state residents as of that date.

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[1] Michigan law defines "spirits" as "a beverage that contains alcohol obtained by distillation, mixed with potable water or other substances, or both, in solution, and includes wine containing an alcoholic content of more than 21% by volume, except sacramental wine and mixed spirit drink." Mich. Comp. Laws § 436.1111(13). Spirits are, thus, what might commonly be referred to as "hard liquor."

Ultimately, though, the legislature declined to pass this measure and instead opted for a statute that necessarily treated in-state and out-of-state companies differently. The statute enacted provides:

> After September 24, 1996, an authorized distribution agent or an applicant to become an authorized distribution agent who directly or indirectly becomes licensed subsequently as a wholesaler shall not be appointed to sell a brand of wine in a county or part of a county for which a wholesaler has been appointed to sell that brand under an agreement required by this act. A wholesaler who directly or indirectly becomes an authorized distribution agent shall not sell or be appointed to sell a brand of wine to a retailer in a county or part of a county for which another wholesaler has been appointed to sell that brand under an agreement required by this act, unless that wholesaler was appointed to sell and was actively selling that brand to retailers in that county or part of that county prior to September 24, 1996, or unless the sale and appointment is the result of an acquisition, purchase, or merger with the existing wholesaler who was selling that brand to a retailer in that county or part of that county prior to September 24, 1996.

Mich. Comp. Laws § 436.1205(3). Pursuant to this statute, an ADA cannot wholesale wine "in an area in which [another] wholesaler had already been assigned or authorized to sell or distribute that brand" of wine as of September 24,

1996, *unless* the ADA was already wholesaling that brand in that territory prior to that date.[2] *Ibid.*

Because Michigan law has always prohibited out-of-state companies from securing a wine wholesaling license, *only in-state companies* are within the class eligible under this statute for the enormous economic benefits of being able to both distribute spirits in their capacity as ADAs and at the same time distribute the vast majority of wine in their capacity as wine wholesalers. Even were an ADA later to become an in-state resident, the 1996 statute forever freezes in place this discriminatory treatment for having been an out-of-state resident (and thus having been legally prohibited from securing a wholesale wine license) as of 1996.[3]

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[2] Petitioners submitted an affidavit below establishing that approximately 97% of wines sold in Michigan on the 2002 affidavit date had been subject to wholesale agreements as of September 24, 1996. App. 57 (Affidavit of Gregory Mauloff). Two in-state companies which are now ADAs were wine wholesalers who handled 70% of the wine market on September 24, 1996, and thus now enjoy extensive opportunities to combine their roles as ADA and wine wholesalers. *Ibid.* The other 30% of the 1996 wine market was handled by other in-state wine wholesalers who now have the opportunity to become ADAs and, unlike petitioners, would enjoy the benefit of combining the functions of their ADA role with their wine wholesaling – the same benefit currently being utilized by other in-state ADA/wine wholesalers, to the great detriment of petitioners and other out-of-state companies.

[3] The statute does allow an ADA to secure a right to distribute pre-September 24, 1996 wines through "acquisition, purchase or merger with the existing [in-state] wholesaler." MCL 436.1205(3). This would, of course, require the out-of-state ADA to become an in-state resident in order to qualify for a wholesale wine license, and would then require the out-of-state ADA to pay an in-state wholesaler (assuming there was a willing in-state business willing to sell) for a privilege widely available to in-state wholesalers without that added cost.

3. Petitioner National Wine & Spirits, Inc. is an Indiana corporation that distributes wines in several states. As of September 24, 1996, National Wine and Spirits, Inc. did not have a Michigan wine wholesaler license and could not obtain one because it was not a Michigan resident. In October 1996, National Wine & Sprits Inc. formed a company called NWS Michigan, Inc., which was appointed as an ADA in December 1996. (Unlike wine wholesaling, there is no in-state residency requirement for ADAs of spirits). Ultimately, in 1999, NWS Michigan, Inc., created a Michigan company named National Wine & Spirits, L.L.C. which, after satisfying the in-state residency requirement, secured a wholesale wine license. Nonetheless, because Michigan treats the new company as closely affiliated with an ADA, petitioners continue to suffer, and (in the absence of corrective action by this Court) will forever suffer the effects of the scheme that freezes differential treatment of companies which were not in-state residents as of September 24, 1996.

4. In 2002, petitioners filed suit against Michigan in the Thirtieth Judicial Circuit Court for the County of Ingham, Michigan.[4] They sought a declaration that Mich. Comp. Laws § 436.1205 is unconstitutional because it discriminates against non-residents who were legally barred from obtaining wholesale wine licenses in 1996 (or since) and are now legally prohibited from selling the overwhelming majority of wines sold in Michigan.

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[4] During the proceedings in the trial court, the Michigan Beer and Wine Wholesalers Association moved successfully to intervene as defendants.

The complaint alleged that the plaintiffs wished to "sell and/or distribute brands of wine in areas for which another wholesaler has been assigned or authorized to sell or distribute those brands under agreement with the wine suppliers." App. 50, ¶ 35. The complaint further alleged that because they could not secure the economic benefits of combining the distribution of spirits and that of most wines, they were at a competitive disadvantage with those ADAs that were in-state residents in 1996 and were thereby able to obtain wine wholesaler agreements at that time. As the complaint explained, "[p]laintiffs have lost substantial revenue because a number of suppliers have cancelled contracts and have switched to in-state companies that are permitted to develop and share dual role cost economies." App. 52, ¶ 46. As a result, "[p]laintiff's $25 million investment in the State of Michigan is at substantial risk because of their inability to compete on a level playing field with in-state companies." App. 52, ¶ 47. The complaint asserted that this discrimination violates both the Commerce Clause and the Equal Protection Clause of the United States Constitution.

5. The trial court granted summary judgment for the State on both claims. With regard to the Commerce Clause claim – the claim which is relevant to this Petition – the trial court held (well before *Granholm* was decided):

> So I don't think there's much room for dispute that where the so-called core power is referred to, in the 21st Amendment, are implicated, that the state action cannot be limited by the Commerce Clause, and in this case, I think those core powers are implicated. This statute clearly, unequivocally creates a particular form of regulation and restriction with respect to the distribution of alcoholic

> beverages, wines, and spirits. A particular scheme is created in this act.

App. 67. The trial court also observed that

> Now, I understand the Plaintiff's argument, that because they were not participating at the cut off date they became forever ineligible to be grandfathered, and that they are an out-of-state firm. I understand that argument, and certainly the statute appears to have that effect, but it has that effect on any entity, any institution, any company that would have been in the same position as the plaintiff. It doesn't single out the plaintiff and it doesn't single out out-of-state companies. That just happens to be the way it was at the time the statute was enacted. * * * [T]he statute does not in its own terms discriminate in any way between out-of-state and in-state entities, and the statute is clearly intended to execute the powers that are referred to in the 21st amendment * * *.

App. 67-68.

6. The Court of Appeals of Michigan affirmed in March 2004 (more than a year before this Court's decision in *Granholm*). App. 1-14. In addressing petitioners' Commerce Clause claim, the court held that the statute does not discriminate against out-of-state economic interests because it "applies to both out-of-state and in-state ADAs." App. 11. The court held that the statute generally was intended to protect wholesalers from competition from ADAs, but that the statute also contains a "legitimate grandfather clause" to allow existing wholesalers who had already invested in their wholesale routes to also become ADAs. App. 12. Although this approach clearly put all out-of-state companies at a disadvantage, the Court of Appeals

held that "'[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.'" App. 12 (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978)).

The Court of Appeals also noted that "there are circumstances in which an out-of-state ADA could become a licensed wine wholesaler after September 24, 1996, and still be permitted to dual." App. 12. Provided that the out-of-state ADA became a Michigan resident (which is required to qualify for a wine wholesaler license), and then acquired or became affiliated with an in-state wine wholesaler, the out-of-state ADA could sell wine in competition with other in-state sellers. Despite those extra burdens being place on out-of-state companies, the Court of Appeals declared that "the statute does not discriminate against out-of-state interests." App. 12.

7. After petitioners sought Leave to Appeal from the Michigan Supreme Court, that court issued an order holding the case in abeyance pending issuance of this Court's decision in *Granholm*. The Michigan Supreme Court stated:

> It appearing to this Court that the case of *Granholm v. Heald*, ___ U.S. ___, 124 S.Ct. 2389, 158 L.Ed.2d 962 (2004) is pending before the United States Supreme Court and that the decision in that case may resolve an issue raised in the present application for leave to appeal, we ORDER that the application be held in ABEYANCE pending the decision in that case.

App. 35. Once this Court issued its decision in *Granholm*, the Michigan Supreme Court granted leave to appeal in

this case. App. 34. The Michigan Supreme Court later issued an order vacating its grant of leave to appeal, however, on the ground that "we are no longer persuaded the questions presented should be reviewed by this Court." App. 29.

The Michigan Supreme Court was divided four-to-three on this order. Justice Weaver dissented on the ground that the case should have been remanded to the Court of Appeals for reconsideration in light of this Court's decision in *Granholm*. App. 30. The statute, she explained, "forever prohibits an out-of-state business from operating as both an authorized distribution agent of spirits and as a distributor of wine." App. 30. Therefore, she concluded, the statute "precludes out-of-state distributors from achieving the benefits of a combined cost economy." App. 31. For example, "when a Michigan distributor operating as both an ADA of spirits and as a wine distributor delivers spirits and wine to retailers on the same truck, it can lower its delivery costs. However, under § 1205(3), out-of-state distributors cannot conserve costs by loading wine and spirits on the same truck." App. 31 n.2. Justice Weaver explained that:

> The United States Supreme Court's decision in *Granholm* had not been released at the time the Court of Appeals decided this case. Had the Court of Appeals had the benefit of the United States Supreme Court's ruling in *Granholm,* it may very well have concluded that the burden on interstate commerce imposed by [§ 1205(3)] outweighs the state's objective in preserving the existing three-tier alcohol distribution system.

App. 31-32. Justice Cavanagh also wrote a dissent, joined by Justice Kelly, explaining that the issues presented in

the case are "jurisprudentially significant and far-reaching." App. 29.

Petitioners filed a timely motion for reconsideration, which the Michigan Supreme Court denied, again by a four-to-three vote. App. 15. Several justices wrote to explain their positions, but the court itself issued no explanation and only two of the justices who voted to deny leave to appeal explained their votes.

Writing for himself and Chief Justice Taylor, Justice Markman explained that he was voting to deny review because the statute "applies to all ADA wine wholesalers who were not already dualing on or before September 24, 1996." App. 17. Therefore, "it does not distinguish between in-state and out-of-state ADA wine wholesalers" and "regulates ADA wine wholesalers evenhandedly." App. 17. With regard to a possible remand for reconsideration in light of *Granholm*, he stated that, "[b]ecause I agree with the Court of Appeals that the statute at issue in the instant case does not discriminate against interstate commerce in violation of the Commerce Clause, there is no need to address whether the Twenty-first Amendment would authorize or permit any discrimination against interstate commerce." App. 20.

Justice Kelly wrote a dissenting opinion, explaining that she would vote to reverse the Court of Appeals and hold the statute unconstitutional. App. 20-28. She explained that the statute creates a favored class (members of which are allowed to function as both ADAs and wholesalers of wine in areas where another wholesaler has a pre-existing agreement) and a disfavored class (members of which cannot serve as both ADAs and wholesalers of wine in areas where another wholesaler has a pre-existing agreement). The favored class contains only in-state

companies, and all out-of-state companies are necessarily in the disfavored class.[5] App. 25-26. Thus, she wrote that, "[b]y giving a class of Michigan companies this advantage, the law creates a system where out-of-state ADAs can never compete on the same terms as the favored class of Michigan ADAs.* * * Because this law favors in-state entities over out-of-state entities, it can survive only if it can withstand strict scrutiny." App. 26.

Applying that scrutiny, Justice Kelly concluded that any legitimate interest the State has in protecting wine wholesalers who are not ADAs from competition with ADAs could have been accomplished in a non-discriminatory manner. She explained that "the Legislature could ban all ADAs, not just those that began wholesaling after September 24, 1996, from wholesaling brands of wine in areas where there is a preexisting wholesale agreement covering them. Because this law is not narrowly tailored to achieve the government's interest, it is invalid and must be struck down." App. 27.

On July 3, 2007, the Honorable John Paul Stevens extended the time for filing a writ of certiorari until September 10, 2007. No. 07A8.

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[5] Justice Kelly explained that petitioners were entitled to challenge the effects of Mich. Comp. Laws Ann. 436.1205(3) in the manner that it affected them, without also having to independently challenge the general residency requirement of Mich. Comp. Laws § 436.1601. She explained that Mich. Comp. Laws § 436.1205(3) "locks in place a system that provides an advantage to a class of Michigan companies that no out-of-state company will ever be able to match." App. 25 n.10.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THIS PETITION FOR CERTIORARI, VACATE THE DECISION OF THE MICHIGAN COURT OF APPEALS, AND REMAND FOR CONSIDERATION IN LIGHT OF *GRANHOLM v. HEALD.*

In *Granholm v. Heald,* 544 U.S. 460 (2005), this Court reaffirmed states' power to maintain a three-tier distribution, wholesale and retail system, but demanded that any such system be applied evenhandedly in ways that do not discriminate against out-of-state interests. The Court declared that, "in all but the narrowest circumstances" state statutes violate the Commerce Clause when "they deprive citizens of their right to have access to the markets of other states on equal terms." *Granholm*, 544 U.S. at 473. Michigan's statutes violated this principle in *Granholm* because they created extra hurdles for out-of-state wineries. Michigan adhered to the three-tier system with respect to all out-of-state wineries, but relaxed that structure for some in-state wineries. As the Court explained:

> The discriminatory character of the Michigan system is obvious. Michigan allows in-state wineries to ship directly to consumers, subject only to a licensing requirement. Out-of-state wineries, whether licensed or not, face a complete ban on direct shipment. The differential treatment requires all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers.

Granholm, 544 U.S. at 473-474.

The Court in *Granholm* also reviewed a New York statute that required out-of-state wineries "to establish a distribution operation in New York in order to gain the privilege of direct-shipment." *Id.* at 474. The Court observed that this "is just an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system." *Ibid.* Thus, the Court held that "New York's in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Id.* at 475 (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963)).

The statute at issue in this case is plagued by the very vices that rendered the statutes in Granholm unconstitutional. Michigan has a general rule prohibiting ADAs from selling a wine brand if another wholesaler is selling that brand of wine in the same territory. This rule is enforced strictly when it comes to companies that were not in-state residents in the year in which the statute passed. For those who were in-state residents at that time, however, the prohibition is relaxed. Those in-state companies, unlike out-of-state entities, were entitled to secure wholesale wine licenses, and those that did (a class that includes only in-state residents) are allowed to secure the enormous economic advantages of acting both as ADAs and as wine wholesalers with regard to all the wines they sold prior to September 24, 1996. This provides them a formidable advantage over out-of-state companies.

As the Court explained in *Granholm*, Michigan is allowed "to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." *Granholm*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (Scalia, J., concurring in judgment)). What Michigan cannot do, however, is to

restrict the right to be licensed in Michigan to Michigan residents. Nor can it write into law huge economic advantages (the right to combine functions as an ADA and wine wholesaler for a wide array of wines) to benefit those particular in-state interests that were in-state residents as of September 24, 1996, while forever barring those who were out-of-state residents on that day from these opportunities.

The challenge that petitioners brought here is very similar to the challenge advanced successfully in *Granholm*. Yet, no Michigan court has reviewed this case in light of this Court's decision in *Granholm*. The highest Michigan court to address the merits of this case was the Michigan Court of Appeals, which rejected petitioners' Commerce Clause challenge to Michigan's regulation of the rights of out-of-state liquor distributors.[6] The Michigan

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[6] Although several of the Michigan Supreme Court justices expressed some views about this case in concurrences and dissents regarding the denial of leave to appeal and denial of reconsideration, the only *action* the Michigan Supreme Court took in the case was to deny leave to appeal. It is, therefore, the judgment of the Michigan Court of Appeals that is before this Court for review. See R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* 167 (8th ed.2002).

For this reason, the various statements accompanying the Michigan Supreme Court's denial of review are not on review here. It does bear noting that among the seven justices, three of them wrote dissents from the denial of review, two of them addressed the merits in defending the denial of review, and two of them wrote nothing at all–simply voting to deny review. No majority emerged except with respect to the order denying leave to appeal. It is axiomatic that one can read no significance into a vote to deny review, which can be based on any number of discretionary factors. See *Williams v. Amerisure, Inc.*, 607 N.W.2d 78, 85 (Mich. 2000) (a denial of leave to appeal "means that the Supreme Court expresses no present view with respect to the legal questions dealt with in the opinion of the Court of Appeals." (quoting

(Continued on following page)

Court of Appeals decision predated this Court's decision in *Granholm*. As Justice Weaver explained in her opinion dissenting from the denial of review by the Michigan Supreme Court, *Granholm* establishes important principles that guide the outcome of this case. App. 30.

The impact of *Granholm* on this case is exemplified by a recent federal district court decision striking down Texas's requirement that liquor licensees be in-state residents:

> *Granholm* is particularly significant to the issue at hand. * * * In *Granholm* the state laws at issue allowed differential treatment to in-state and out-of-state shippers of wine. The Supreme Court, although recognizing that states have specific constitutional power granted by the Twenty-first Amendment to regulate alcohol, [held that] such power is not absolute, but must be considered in the light of Commerce Clause jurisprudence.
>
> > States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded

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Frishett v. State Farm Mut. Automobile Ins. Co., 378 Mich. 733 (1966)). Thus, a majority of the Michigan Supreme Court has never addressed, much less resolved, the issue presented here, and this Petition for Certiorari must be evaluated with reference to the pre-*Granholm* decision issued by the Michigan Court of Appeals.

> terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.
>
> [544 U.S.] at 493. Texas has made no more a compelling case for banning out-of-state residents from holding permits and licenses for the wholesaling, distributing, or importing of alcoholic beverages in Texas than New York and Michigan did for restricting the shipment of wine into those states by out-of-state producers.

Southern Wine and Spirits of Texas, Inc. v. Steen, 486 F. Supp. 2d 626, 632 (W.D. Tex. 2007). See also *Peoples Super Liquor Stores, Inc. v. Jenkins,* 432 F. Supp. 2d 200, 218-222 (D. Mass. 2006) (striking down a residency requirement pursuant to *Granholm*).

As in *Granholm*, petitioners here are ineligible for valuable benefits that were and are available only to in-state residents. The primary (pre-*Granholm*) defense the Michigan Court of Appeals offered for this differential treatment was that the statute created a "legitimate grandfather clause" that benefited those who already had wholesale licenses as of 1996.[7] The fact that only in-state residents could possibly benefit from this exception was, in the view of the Court of Appeals, of no moment. App. 11-12.

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[7] The Michigan trial court relied almost entirely on the Twenty-first Amendment in rejecting petitioners' Commerce Clause challenge. App. 66-68. That reasoning was squarely rejected in *Granholm*. See *Granholm*, 544 U.S. at 486 (the Twenty-first Amendment "does not displace the rule that States may not give a discriminatory preference" to in-state residents); *id.* at 487 ("state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause").

Rather, the Court of Appeals adopted the trial court's reasoning that the grandfather clause's exclusion of all out-of-state residents did not reflect discrimination, but was simply the product of fortuity: "The trial court ruled that there was no evidence that the law singled out plaintiffs or out-of-state companies, rather, " 'That just happens to be the way it was at the time the statute was enacted.' " App. 4.

This effort to legitimize discrimination against out-of-state companies cannot withstand *Granholm*'s clear impact on this case. This is not an instance of a neutral grandfather clause which just happens to benefit in-state residents alone because they alone, fortuitously, happen to be engaged in some activity. Rather, this is a grandfather clause that exclusively benefits the in-state class because, *as a matter of law, only in-state residents were allowed* to engage in the activity that is the subject of the grandfather clause. Michigan law forbade (and still forbids) any out-of-state resident from acquiring a wholesale wine license. Mich. Comp. Laws § 436.1601. The so-called grandfather clause at issue here cannot immunize that discrimination from attack. The in-state residency requirement is decidedly unconstitutional after *Granholm*, and cannot be sanitized by virtue of a "grandfather clause" that freezes that discrimination in place forever.

A simple example illustrates the point. Assume that the State of Michigan were to pass a statute today, in response to *Granholm*, declaring that no winery can engage in direct-shipping to Michigan consumers, except any winery that was engaged in direct shipping to Michigan consumers as of 2004 is allowed to continue that practice under a "grandfather clause." It would be frivolous to defend that statute on the ground that the grandfather clause was neutral and "just happens" to benefit

in-state wineries simply because "'[t]hat just happens to be the way it was at the time the statute was enacted'" App. 4. Yet this is precisely how the Michigan Court of Appeals defended the "grandfather clause" in this case, despite the statute's incorporation of a *de jure* classification that discriminates against out-of-state residents.[8]

The Michigan Court of Appeals also sought to minimize the discrimination against out-of-state residents by referring to the statute's provision allowing an ADA to "dual" by affiliating with or acquiring an in-state company that was selling wholesale wine as of September 24, 1996. This defense is identical to the one rejected by this Court in *Granholm*. In order to "dual" under the Michigan statute, an out-of-state ADA would first have to establish in-state residency to satisfy the wholesale wine license requirements and then invest in acquiring or affiliating with an in-state wholesaler who had territory for the desired brands as of September 24, 1996. Just as requiring an out-of-state company to establish an in-state branch office and warehouse did not remedy New York's discrimination against out-of-state wineries, so too requiring an out-of-state resident to become a Michigan resident and then affiliate with or acquire a Michigan wholesaler does nothing to erase the discrimination against out-of-state residents. See *Granholm*, 544 U.S. at 475 (imposing extra costs on out-of-state companies is just another form of discrimination).

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[8] For this reason, petitioners' challenge to the constitutionality of the "grandfather clause" is an entirely appropriate way of challenging the perpetuation of the unconstitutional residency requirement. See *supra*, note 5.

The Commerce Clause's prohibition on discrimination against out-of-state residents cannot be overcome by a "let them move to Michigan" response. That option could be advanced in support of *any* discrimination against out-of-state residents in any context. The point of the anti-discrimination principle of the Commerce Clause is that states may not force individuals or entities to become in-state residents in order to secure the benefits available to state residents.[9]

Although various Justices of this Court have expressed disagreement about the use of the grant, vacate, and remand ("GVR") order in some specific contexts, there is unanimous agreement that a GVR is appropriate when this Court has issued a decision which might affect the outcome of the case after the lower court has ruled. See *Lawrence v. Chater*, 516 U.S. 163, 166-167 (1996) (per curiam) (GVR is appropriate when an intervening decision has been issued); *Stutson v. United States*, 516 U.S. 163, 180 (1996) (Scalia, J., dissenting) (agreeing that a GVR is appropriate in instances "in which an intervening event (ordinarily a post-judgment decision of this Court) has cast doubt on the judgment rendered by a lower federal court or a state court concerning a *federal* question." (emphasis in original)). This case fits these criteria squarely. *Granholm*

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[9] Of course, discrimination against out-of-state interests may survive a Commerce Clause challenge if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)). The Michigan Court of Appeals never addressed this inquiry, which it will have the opportunity to do upon remand. *Granholm* speaks to that inquiry as well, and the Court of Appeals will have the benefit of *Granholm* in assessing that aspect of the case.

surely "casts doubt" on the Michigan Court of Appeals' resolution of the Commerce Clause claim petitioners have brought, and the case should be remanded to that court for it to consider the various ways in which *Granholm* impacts this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, the decision of the Michigan Court of Appeals should be vacated, and the case should be remanded to the Michigan Court of Appeals for reconsideration in light of *Granholm*. In the alternative, the Court should grant certiorari to resolve the important issues this case presents.

Respectfully submitted,

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2004 WL 595068

Court of Appeals of Michigan.
NATIONAL WINE & SPIRITS, INC.,
Nws Michigan Inc. and National Wine & Spirits, LLC,
Plaintiffs-Appellants,
v.
STATE of Michigan, Defendant-Appellee,
andMICHIGAN BEER & WINE WHOLESALERS ASSOCIATION, Intervening Defendant-Appellee.
No. 243524.

March 25, 2004.

Before: KELLY, P.J. and MURPHY and NEFF, JJ.

[UNPUBLISHED]

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition to defendant and dismissing plaintiffs' claims that MCL 436.1205(3) of Michigan's Liquor Control Code (MLCC)[1] violates the Equal Protection Clause and the Commerce Clause. We affirm.

I. Basic Facts

National Wine & Spirits, Inc. (National Inc.) is an Indiana corporation. NWS Michigan Inc. (NWS), a subsidiary of National Inc., incorporated in Michigan in October 1996, and became an authorized distribution agent of liquor (ADA) in Michigan in December 1996. National Wine & Spirits, LLC (National LLC), also a subsidiary of National Inc., incorporated in Michigan in

[1] MCL 436.1101, *et seq.*

December 1998, and became a licensed wine wholesaler in Michigan in November 1999. The parties agree that for purposes of the statute at issue, defendant treats the three plaintiffs as one entity.

Plaintiffs filed a complaint for declaratory judgment against defendant alleging that defendant, knowing that NWS was the largest ADA in Michigan and owned by National Inc., enacted MCL 436.1205(3) which prohibits an ADA that is licensed as a wine wholesaler after September 24, 1996, from "dualing," i.e., selling a brand of wine in an area in which another wine wholesaler has already been licensed to sell that brand. It also alleged that on September 24, 1996, only in-state companies were licensed as wine wholesalers. Therefore, plaintiffs alleged MCL 436.1205(3) "effectively prohibits all out of state companies from serving as both an ADA of spirits and a licensed wholesaler of wine in Michigan." Plaintiffs alleged that MCL 436.1205(3) violates the Equal Protection Clause because it creates two classes of ADAs and the classification is not rationally related to any legitimate government purpose. Plaintiffs also alleged that MCL 436.1205(3) violates the Commerce Clause because the law precludes ADA/wholesalers from dualing if they did not do so before September 24, 1996, and prior to that date no out-of-state ADAs were licensed to wholesale wine in Michigan.

Plaintiffs filed a motion for summary disposition of its equal protection claim under MCR 2.116(C)(9) and (C)(10). The only evidence in support of their motion was the affidavit of Steve Null, director of operations for NWS, who attested to the facts alleged in plaintiffs' complaint. Defendant responded to the motion requesting that

summary disposition be granted in its favor under MCR 2.116(I)(2).

Addressing plaintiffs' motion, the trial court determined that preserving an orderly and stable wholesale wine distribution network which also allows some competition is a legitimate state interest. With regard to whether the classification was rationally related to this purpose, the trial court concluded:

> Until this amendment was enacted in 1996 wine wholesalers in Michigan, and indeed all alcoholic beverage industry business in Michigan, lived in a world without ADAs. An ADA is a creature intended in most respects to take the place of direct action by the State of Michigan and its employees. . . .

I think it's also undisputed that for an ADA to also be in the wine wholesaler business is a pretty good economic advantage, particularly when we have competing wholesalers in the same district wholesaling the same brand of wine, so to prevent that very specific and narrow economic disadvantage from being created by privatization, the legislature enacted this amendment and I think I cannot say that this amendment is not rationally related to that purpose.

The trial court also determined that the provision contained a legitimate grandfather clause because:[T]hese wine wholesalers who were wholesaling a particular brand of wine on a non-exclusive basis in a particular territory before this amendment were doing, as I say, in a world without ADAs, and once you introduce the ADA into the equation, it becomes a completely different world. And yet they made these investments over the years, and they may

not all be hard capital, hard goods, they may be relationships, but still they costs money and time and effort to create those ongoing relationships, and I think the legislature can legitimately take the position that it's not fair to strip them of that in this new regulatory climate created by the introduction of privatization.

The trial court denied plaintiffs' motion for summary disposition and subsequently entered an order granting defendant's motion to dismiss plaintiffs' equal protection claim.

Defendant filed a motion for summary disposition of plaintiffs' commerce clause claim under MCR 2.116(C)(8) and (C)(10).[2] Addressing this motion, the trial court pointed out that legislative intent is one way of interpreting an ambiguous statute. But plaintiffs were asking the trial court to discern the Legislature's motivation in passing the law which is "beyond the power of this Court." It further ruled that plaintiffs were confusing "what everyone knew" with "legislative intent." Finally, the trial court ruled that there was no evidence that the law singled out plaintiffs or out-of-state companies, rather, "That just happens to be the way it was at the time the statute was enacted." Accordingly, the trial court granted defendant's motion and entered an order dismissing plaintiffs' claims with prejudice.

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[2] After the trial court granted Michigan Beer & Wine Wholesalers Association's (MBWWA) motion to intervene over plaintiffs' objection, MBWWA joined in defendant's motion.

II. Summary Disposition

Plaintiffs argue that the trial court erred in granting summary disposition of its claims that MCL 436.1205(3) violates the Equal Protection Clause and the Commerce Clause. We disagree.

A. Standard of Review

We review de novo a trial court's decision on a motion for summary disposition. *Maiden v. Rozwood,* 461 Mich. 109, 118; 597 NW2d 817 (1999). In evaluating a motion under MCR 2.116(C)(10), the trial court considers the pleadings, affidavits, depositions and other documentary evidence in a light most favorable to the nonmoving party and determines whether the moving party was entitled to judgment as a matter of law. *Id.* at 120. MCR 2.116(C)(8) tests the "legal sufficiency of the complaint" and permits dismissal of a claim where the opposing party has failed to state a claim on which relief can be granted. *Id.* at 119. Only the pleadings are examined; documentary evidence is not considered. *Id.* Where the claim is "so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery," the motion should be granted. *Id.*

The constitutionality of a statute is also a question of law that we review de novo. *Michigan State Employees Ass'n v Liquor Control Comm No 2,* 232 Mich.App 456, 463; 591 NW2d 353 (1998). "[S]tatutes are presumed constitutional, and courts have a duty to so construe a statute unless unconstitutionality is clearly apparent." *Mahaffey v. Attorney General,* 222 Mich.App 325, 344; 564 NW2d 104 (1997). The party asserting the constitutional challenge has the burden of overcoming this presumption.

Michigan Soft Drink Ass'n v. Dep't of Treasury, 206 Mich.App 392, 401; 522 NW2d 643 (1994).

B. MCL 436.1205(3)

MCL 436.1205(3) provides in relevant part:

After September 24, 1996, an authorized distribution agent or an applicant to become an authorized distribution agent who directly or indirectly becomes licensed subsequently as a wholesaler shall not be appointed to sell a brand of wine in a county or part of a county for which a wholesaler has been appointed to sell that brand under an agreement required by this act. A wholesaler who directly or indirectly becomes an authorized distribution agent shall not sell or be appointed to sell a brand of wine to a retailer in a county or part of a county for which another wholesaler has been appointed to sell that brand under an agreement required by this act, unless that wholesaler was appointed to sell and was actively selling that brand to retailers in that county or part of that county prior to September 24, 1996, or unless the sale and appointment is the result of an acquisition, purchase, or merger with the existing wholesaler who was selling that brand to a retailer in that county or part of that county prior to September 24, 1996.

Thus, MCL 436.1205(3) prohibits an ADA that is licensed as a wine wholesaler after September 24, 1996, from dualing. It also prohibits wine wholesalers that become ADAs after September 24, 1996, from dualing unless they already had dualing agreements before September 24, 1996, or they become appointed to dual by "acquisition, purchase, or merger" with an existing wine wholesaler with a dualing agreement.

C. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment requires that persons under similar circumstances be treated alike. *El Souri v. Dep't of Social Services,* 429 Mich. 203, 207; 414 NW2d 679 (1987); *Crego v. Coleman,* 232 Mich.App 284, 292; 591 NW2d 277 (1998). The rational basis test is used to review equal protection challenges to social or economic legislation. *Neal v. Oakwood Hosp Corp,* 226 Mich.App 701, 717; 575 NW2d 68 (1997).[3] "'Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest.'" *Shavers v. Attorney General,* 402 Mich. 554, 613, 624; 267 NW2d 72 (1978), quoting *United States Dep't of Agriculture v Moreno,* 413 U.S. 528, 533; 93 S Ct 2821; 37 L Ed 782 (1973). "Under the rational-basis test, a statute will ordinarily be sustained if it can be said to advance a legitimate governmental interest, even if the law seems to be unwise or work to the disadvantage of a particular group, or if the rationale seems to be tenuous." *Westlake Transport v. PSC,* 255 Mich.App 589, 617; 662 NW2d 784 (2003). The wisdom, need or appropriateness of the legislation is irrelevant. *Crego, supra.* "A legislative classification may not be set aside if any set of facts may reasonably be conceived to justify it." *Id.* "The rationale behind the classification may be supported by facts either known or reasonably assumed, even if those facts may be debatable." *Westlake, supra* at 617.

Defendant asserts that the purpose of the statute is to protect against collusion, price-fixing and monopolization;

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[3] The parties agree that this is the proper test in this case.

specifically, the statute employs a three-tier system of supplier, wholesaler, retailer. Defendant argues that because ADAs receive state subsidies,[4] allowing them to dual would unfairly threaten to put existing wine wholesalers out of business. Defendant argues that this would essentially destroy the middle tier of the distribution system.

As stated in its preamble,[5] one of the purposes of the MLCC is "to provide for the control of the alcoholic liquor traffic within this state." This Court has acknowledged that the MLCC generally operates to bar the creation of "tied-house" systems of alcoholic beverage production, distribution, and sale:

"Tied house" statutes are aimed at preventing the integration of manufacturing, wholesale, warehouse, and retail outlets in the liquor industry. . . . It has been a fear . . . that economic power at one level in this four-tiered system (manufacturers, warehouses, wholesalers, and retailers) could be transferred to another level in order to gain control at the second level. [*Traffic Jam & Snug, Inc v Michigan Liquor Control Commission,* 194 Mich.App 640, 642; 487 NW2d 768 (1992), quoting *Borman's Inc v. Liquor Comm,* 37 Mich.App 738, 746; 195 NW2d 316 (1972).]

Other courts have also recognized that multi-tiered alcohol distribution systems are common among the

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[4] Plaintiffs do not contest that ADAs receive state subsidies. In fact, their complaint references these subsidies.

[5] The preamble is useful for interpreting an act's subject, purpose and scope but is not controlling authority. *Malcolm v. East Detroit,* 437 Mich. 132, 143; 468 NW2d 479 (1991); *People v. Al-Saiegh,* 244 Mich.App 391, 396-397; 625 NW2d 419 (2001).

states. After the Twenty-First Amendment was passed, states either monopolized liquor sales or devised a three-tier system which grants licenses to manufacturers, wholesalers and retailers with detailed regulations. *TFWS, Inc v. Schaefer,* 242 F 3d 198, 202 (4 CA 2001). The three-tiered system used by many states was intended to prevent the perceived danger of "tied houses," i.e., large manufacturers that controlled the entire distribution process all the way down to the final sale. It was believed that this would cause increased sales, abusive sales practices and excessive consumption. *Nat'l Distrib Co, Inc v Bureau of Alcohol, Tobacco and Firearms,* 626 F 2d 997, 1004-1010 (DC Cir1980).

Thus it is well established that preserving an orderly and stable three-tiered alcohol distribution system which also allows some competition is a legitimate government interest. Plaintiffs argue that they are "unable to imagine a legitimate state purpose for creating these two classes distinguished only by the date September 24, 1996." But the question of whether the date is arbitrary goes to whether the classification is rationally related to defendant's purpose.

We conclude that the classification based on date is rationally related to defendant's purpose. Before 1996, there were no ADAs because the distribution of alcohol was handled solely by Michigan's Liquor Control Commission. After defendant allowed ADAs to distribute alcohol, it realized that ADAs receiving state subsidies that were also wine wholesalers had an unfair economic advantage over wine wholesalers that were not ADAs. In order to prevent this specific unfair advantage, it decided to preclude ADA/wholesalers from dualing. But because some ADA/wholesalers already had dualing agreements, defendant

did not take away their pre-existing right to dual. It was necessary for the Legislature to insert a date prior to the date the statute was effective because if it had not ADAs and wholesalers would have had a window of time in which to obtain licenses and/or dualing agreements. In other words, it would have allowed circumstances to be altered beyond the status quo.

Plaintiffs argue that the statute did not include a legitimate grandfather clause because it gave "existing wine wholesalers an *additional benefit* that they had never before enjoyed, i.e., the right to be both a wine wholesaler *and* an ADA." We disagree. A wine wholesaler could become an ADA both before and after September 24, 1996. The focus of the statute is on ADA/wholesalers dualing, not on allowing wholesalers to become ADAs or vice versa. Rather than penalizing a wine wholesaler that already had a dualing agreement when/if it became an ADA, the Legislature allowed the wine wholesaler to continue to operate under their preexisting agreement.

Therefore, the trial court did not err in granting defendant summary disposition of plaintiffs' equal protection claim.

D. Commerce Clause

The Commerce Clause provides that Congress "shall have power . . . [t]o regulate commerce . . . among the several states. . . ." US Const, art I, § 8, cl. 3. The "dormant Commerce Clause" "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys v Dep't of Environmental Quality,* 511 U.S. 93, 98; 114 S Ct 1345; 128 L.Ed.2d 13 (1994).

Under traditional Commerce Clause analysis, the Supreme Court has adopted a two-tiered approach to determining the validity of the statute. *Brown-Forman Distillers Corp v New York State Liquor Auth,* 476 U.S. 573, 578; 106 S Ct 2080; 90 L Ed 552 (1986). "The first step is to determine whether the statute discriminates against interstate interests or merely regulates evenhandedly with only incidental effects upon interstate commerce." *Westlake, supra* at 662, citing *Oregon Waste, supra* at 100. "'Discrimination' simply means differential treatment of instate and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste, supra* at 99.

MCL 436.1205(3) does not discriminate against out-of-state economic interests. The statute is but one provision of a comprehensive system that regulates the flow of all liquor into and within the state. MCL 436.1205(3) applies to both out-of-state and in-state ADAs. Plaintiffs assert that defendant inserted the date in the statute to discriminate against out-of-state ADA/wholesalers because it "knew" that before that date all ADA/wholesalers were in-state entities. But plaintiffs present no evidence of the Legislature's intent, instead they rely on mere speculation. We agree with the trial court that plaintiffs confuse "what everyone knew" with "legislative intent." The trial court determined that plaintiffs were asking it to discern the Legislature's motivation in passing the law which is "beyond the power of this Court." Furthermore, we agree that the trial court could not determine the Legislature's intent, but not because it was beyond its *power,* but rather because it was beyond its *ability* as plaintiffs only presented its conjectures about what "everybody knew" and what the Legislature's intent "must have been."

As discussed above, the statute contains a legitimate grandfather clause. Defendant asserts the date in the statute had to be before the effective date because if it was not, ADAs and wholesalers would have had a window of time to acquire licenses and/or obtain dualing agreements necessary to gain the unfair advantage that the statute sought to prevent. The reason it allowed already dualing wholesalers to continue to dual after they became ADAs is that they had already entered dualing agreements and defendant did not wish to take this pre-existing right away. "The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce." *Exxon Corp v. Governor of Maryland,* 437 U.S. 117, 126; 98 S Ct 2207; 57 L Ed 91 (1978).

Further, there are circumstances in which an out-of-state ADA could become a licensed wine wholesaler after September 24, 1996, and still be permitted to dual. MCL 436.1205(3) permits a wine wholesaler that was dualed before September 24, 1996, to subsequently become an ADA, indirectly, through affiliation with an out-of-state ADA (there are no residency requirements for ADAs), and remain dualed. It also permits a wine wholesaler that was not dualed (but was licensed) before September 24, 1996, to subsequently become an ADA indirectly, through affiliation with an out-of-state ADA, and obtain dualing rights through "acquisition, purchase, or merger" of or with a wine wholesaler with a dualing agreement. Therefore, we conclude that the statute does not discriminate against out-of-state interests.

Our next determination is whether the statute regulates evenhandedly with only incidental effects on interstate commerce. We conclude that plaintiffs have failed to

establish that the statute has even an incidental effect on interstate commerce, i.e., "the interstate flow of articles of commerce." Plaintiffs have proved that they, an out-of-state ADA and in-state wine wholesaler, are precluded from dualing. They have also shown, and defendant agrees, that all wine wholesalers must meet residency requirements to obtain a license.[6] But plaintiffs have failed to show that MCL 436.1205(3) affects the interstate flow of wine and alcohol. Although a wine wholesaler's license permits the wholesaler to sell a certain brand of wine in a certain area, there is no evidence that MCL 436.1205(3) affects whether the brand sold comes from in-state or out-of-state. Nor is there any evidence that the lack of out-of-state ADA/wholesalers in Michigan affects the interstate flow of alcohol. Thus, we discern no indication that the statute prohibits the flow of interstate goods, places an added cost on them or distinguishes between them in the market. The Commerce Clause "protects the interstate market, not particular interstate firm, from prohibitive or burdensome regulations." *Exxon, supra* at 217-218.

The fact that the statute prohibits plaintiffs from dualing does not implicate the Commerce Clause. Therefore, the trial court did not err in granting defendant's motion for summary disposition of plaintiffs' commerce clause claim.

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[6] MCL 346.110(1) contains a one-year residency requirement. This provision was not challenged in the trial court or on appeal.

III. Intervention

Based on our conclusion that the trial court did not err in granting summary disposition, plaintiffs' remaining issue regarding MBWWA's motion to intervene is moot.

Affirmed.

729 N.W.2d 234

Supreme Court of Michigan.

NATIONAL WINE & SPIRITS, INC., NWS Michigan, Inc., and National Wine & Spirits, L.L.C., Plaintiffs-Appellants,

v.

STATE of Michigan, Defendant-Appellee, and Michigan Beer & Wine Wholesalers Association, Intervening Defendant-Appellee.

Docket No. 126121.

COA No. 243524.

April 11, 2007.

On order of the Court, the motion for reconsideration of this Court's November 29, 2006 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

MARKMAN, J., concurs and states as follows:

I concur in the order denying plaintiffs' motion for reconsideration for essentially the reasons set forth by the Court of Appeals. I therefore agree with the majority that an opinion of this Court is unnecessary. However, given that we held plaintiffs' application in abeyance pending the United States Supreme Court's decision in *Granholm v. Heald,* 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005), and then twice heard oral arguments on the issues presented, I wish to add something more to this Court's order of denial.

The statute at issue here, MCL 436.1205(3), prohibits an authorized distribution agent (ADA) that is licensed as a wine wholesaler from "dualing," i.e., selling a brand of wine in an area in which another wine wholesaler has

already been licensed to sell that brand, unless the wine wholesaler was dualing on or before September 24, 1996.[1] Plaintiffs contend that § 205(3) violates the Commerce Clause and the Equal Protection Clause of the United States Constitution.

The Commerce Clause, U.S. Const., art. I, § 8, provides that Congress shall have the power "[t]o regulate Commerce . . . among the several States. . . ." Derived from this is the so-called "dormant" Commerce Clause that prohibits state laws that discriminate against or unduly burden interstate commerce. *General Motors Corp. v. Tracy,* 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761 (1997).

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[1] MCL 436.1205(3) provides:

An authorized distribution agent shall not have a direct or indirect interest in a supplier of spirits or in a retailer. A supplier of spirits or a retailer shall not have a direct or indirect interest in an authorized distribution agent. An authorized distribution agent shall not hold title to spirits. After September 24, 1996, an authorized distribution agent or an applicant to become an authorized distribution agent who directly or indirectly becomes licensed subsequently as a wholesaler shall not be appointed to sell a brand of wine in a county or part of a county for which a wholesaler has been appointed to sell that brand under an agreement required by this act. A wholesaler who directly or indirectly becomes an authorized distribution agent shall not sell or be appointed to sell a brand of wine to a retailer in a county or part of a county for which another wholesaler has been appointed to sell that brand under an agreement required by this act, unless that wholesaler was appointed to sell and was actively selling that brand to retailers in that county or part of that county prior to September 24, 1996, or unless the sale and appointment is the result of an acquisition, purchase, or merger with the existing wholesaler who was selling that brand to a retailer in that county or part of that county prior to September 24, 1996.

The restriction in § 205(3) applies to all ADA wine wholesalers that were not already dualing on or before September 24, 1996. It does not distinguish between in-state and out-of-state ADA wine wholesalers. Because the restriction in § 205(3) on dualing does not so distinguish, it regulates ADA wine wholesalers evenhandedly. Therefore, § 205(3) does not discriminate against or unduly burden interstate commerce in violation of the Commerce Clause.

In order to obtain a wine wholesale license in Michigan, one must have resided in Michigan for at least one year. MCL 436.1601(1).[2] Plaintiffs argue that because of this residency requirement, as of September 24, 1996, only Michigan residents were dualing wine wholesalers, and § 205(3) effectively prohibits companies that did not dual in Michigan on or before September 24, 1996, from ever dualing in Michigan. Thus, say plaintiffs, the Legislature has "permanently barred" any out-of-state ADA/wine wholesalers from ever dualing.

First, out-of-state ADA/wine wholesalers are not "permanently barred" from dualing because § 205(3) allows them to dual if they acquire, purchase, or merge with a company that dualed in Michigan on or before September 24, 1996.

Second, plaintiffs have not properly challenged the one-year residency requirement of MCL 436.1601(1). At oral arguments, plaintiffs' counsel stated, "We have not challenged [§ 601(1)] nor do we think it is critical to our

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[2] MCL 436.1601(1) provides: "A wholesale licensee or an applicant for a wholesale license, if an individual, shall be licensed only if that individual has resided in this state for not less than 1 year immediately prior to the date of issuance of the license."

case." Further, whether plaintiffs would have standing to challenge the residency requirement of § 601 is questionable given that National Wine & Spirits, L.L.C., is a Michigan resident and a licensed wine wholesaler in Michigan. As plaintiffs' counsel acknowledged at oral argument, when asked why they had not challenged the residency requirement of § 601, "[B]ecause we are operating now. We have met the residency requirement. . . ."

The Fourteenth Amendment of the United States Constitution provides, "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Am. XIV. The rational basis test is used to review equal protection challenges to social or economic legislation. *Phillips v. Mirac, Inc.*, 470 Mich. 415, 434, 685 N.W.2d 174 (2004). The parties agree that the rational basis test is the appropriate test in this case. "Under this test, 'courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose.'" *Id.* at 433, 685 N.W.2d 174 (citation omitted). "This highly deferential standard of review requires a challenger to show that the legislation is ' "arbitrary and wholly unrelated in a rational way to the objective of the statute."' " *Id.* (citation omitted).

The rational basis test considers whether the "'classification itself is rationally related to a legitimate governmental interest.'" But the rational basis test does not test "the wisdom, need, or appropriateness of the legislation. . . ." We examine the purpose with which the legislation was enacted, not its effects: "That the accommodation struck may have profound and far-reaching consequences . . . provides all the more reason for this Court to defer to the congressional judgment unless it is demonstrably arbitrary or irrational." In discerning the purpose, we look

to "any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." [*Id.* at 434-435, 685 N.W.2d 174 (citations omitted).]

Regardless of whether MCL 436.1205(3) constitutes wise or prudent legislation, it is rationally related to an apparent governmental interest, namely, that of preventing ADAs from dominating the wholesale wine market, while protecting the business interests of wine wholesalers who were dualing on or before September 24, 1996. As the Court of Appeals explained:

> We conclude that the classification based on date is rationally related to defendant's purpose. Before 1996, there were no ADAs because the distribution of alcohol was handled solely by Michigan's Liquor Control Commission. After defendant allowed ADAs to distribute alcohol, it realized that ADAs receiving state subsidies that were also wine wholesalers had an unfair economic advantage over wine wholesalers that were not ADAs. In order to prevent this specific unfair advantage, it decided to preclude ADA/wholesalers from dualing. But because some ADA/wholesalers already had dualing agreements, defendant did not take away their preexisting right to dual. It was necessary for the Legislature to insert a date prior to the date the statute was effective because if it had not ADAs and wholesalers would have had a window of time in which to obtain licenses and/or dualing agreements. In other words, it would have allowed circumstances to be altered beyond the status quo.... Rather than penalizing a wine wholesaler that already had a dualing agreement when/if it became an ADA, the Legislature allowed

> the wine wholesaler to continue to operate under their preexisting agreement.

Because § 205(3) is rationally related to a legitimate government purpose, it does not violate the Equal Protection Clause.

Plaintiffs' application for leave to appeal was held in abeyance pending the decision in *Heald*. In *Heald,* the United States Supreme Court held that allowing in-state wineries to sell wine directly to consumers, but prohibiting out-of-state wineries from doing so, discriminated against interstate commerce in violation of the Commerce Clause and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment.[3] Because I agree with the Court of Appeals that the statute at issue in the instant case does not discriminate against interstate commerce in violation of the Commerce Clause, there is no need to address whether the Twenty-first Amendment would authorize or permit any discrimination against interstate commerce.

TAYLOR, C.J., joins the statement of MARKMAN, J.

MICHAEL F. CAVANAGH and WEAVER, JJ., would grant reconsideration.

MARILYN J. KELLY, J., dissents and states as follows:

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[3] Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Plaintiffs brought an action challenging the constitutionality of MCL 436.1205(3). The statute prevents an authorized distribution agent (ADA) from acting as a wine wholesaler and distributor in an area where a wholesale agreement existed before September 24, 1996. An exception exists for an ADA with respect to the brands of wine it sold in the area before that date.

Both the trial court and the Court of Appeals found the statute constitutional. This Court heard oral argument on the application for leave to appeal and granted full briefing and argument on the merits of the case. However, the Court then inexplicably decided that leave to appeal had been improvidently granted. I joined Justice Cavanagh's statement dissenting from that decision. Now plaintiffs have filed a motion for reconsideration. I would grant that motion, reverse the judgment of the Court of Appeals, and hold that MCL 435.1205(3) is unconstitutional as applied.

Facts of the Case

Following the adoption of the Twenty-first Amendment,[4] Michigan enacted the Michigan Liquor Control Act of 1933.[5] Under the act, there were no private distributors of spirits. Rather, the state itself purchased spirits and distributed them to licensed outlets using a three-tiered system. This model was intended to keep manufacturers, wholesalers, and retailers separate and distinct. In contrast

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[4] U.S. Const., Am. XXI.

[5] MCL 436.1 *et seq.*, repealed by 1998 PA 58, effective April 14, 1998.

to the distribution of spirits, the distribution of wine is and always has been done by private parties.

In 1996, the State of Michigan ended its role in warehousing and distributing spirits and adopted a system whereby authorized distribution agents handled these functions. The state paid the ADAs for their services. In the course of privatizing warehousing and delivery, the state also imposed eligibility and operational restrictions on the ADAs. Certain of those restrictions are at issue in the case and are contained in MCL 436.1205(3).[6] They prohibit ADAs who wish to sell given brands of wine wholesale from doing so in areas where a wholesaler has already been assigned to sell those brands. An exception

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[6] MCL 436.1205(3) provides:

(3) An authorized distribution agent shall not have a direct or indirect interest in a supplier of spirits or in a retailer. A supplier of spirits or a retailer shall not have a direct or indirect interest in an authorized distribution agent. An authorized distribution agent shall not hold title to spirits. After September 24, 1996, an authorized distribution agent or an applicant to become an authorized distribution agent who directly or indirectly becomes licensed subsequently as a wholesaler shall not be appointed to sell a brand of wine in a county or part of a county for which a wholesaler has been appointed to sell that brand under an agreement required by this act. A wholesaler who directly or indirectly becomes an authorized distribution agent shall not sell or be appointed to sell a brand of wine to a retailer in a county or part of a county for which another wholesaler has been appointed to sell that brand under an agreement required by this act, unless that wholesaler was appointed to sell and was actively selling that brand to retailers in that county or part of that county prior to September 24, 1996, or unless the sale and appointment is the result of an acquisition, purchase, or merger with the existing wholesaler who was selling that brand to a retailer in that county or part of that county prior to September 24, 1996.

exists for ADAs that were selling those brands in those areas before September 24, 1996.

Since the end of Prohibition, Michigan law has required every wine wholesaler to be a Michigan resident for one year before obtaining a wholesaler's license. See MCL 436.1601. The effect of MCL 436.1205(3) is that only in-state companies can take advantage of the exception, because only they were licensed wine wholesalers on September 24, 1996.

Plaintiffs National Wine & Spirits, Inc.; NWS Michigan, Inc.; and National Wine & Spirits, L.L.C., brought suit challenging MCL 436.1205(3).[7] Plaintiffs argue that the statute violates the Commerce Clause[8] and the Equal Protection Clause[9] of the United States Constitution. The trial court determined that the statute violated neither and granted summary disposition to defendants. The Court of Appeals affirmed.

Analysis of the Law

The Commerce Clause

Article 1, § 8 of the United States Constitution gives Congress the power to regulate commerce among the states. The United States Supreme Court has inferred, as a necessary corollary to this power, that state and local laws placing an undue burden on interstate commerce

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[7] Defendants are the state of Michigan and the Michigan Beer & Wine Wholesalers Association of Michigan. Michigan Beer & Wine Wholesalers represents 75 percent of the licensed wholesalers in Michigan. It intervened in the action on April 17, 2002.

[8] U.S. Const., art. I, § 8, cl. 3.

[9] U.S. Const., Am. XIV, § 1.

cannot be upheld. This principle has generally become known as the "Dormant Commerce Clause." The United States Supreme Court has adopted a two-tiered approach to determining whether a state regulation violates the Dormant Commerce Clause.

When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, [it is] generally struck down. . . . When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, [it must be] examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. . . . In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. [*Brown-Forman Distillers Corp. v. New York State Liquor Authority,* 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986).]

Recently, in explaining its Dormant Commerce Clause jurisprudence, the United States Supreme Court said that states may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. *Granholm v. Heald,* 544 U.S. 460, 472, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005). Laws that establish a competitive advantage deprive citizens of the right to access the markets of other states on equal terms. *Id.* at 473, 125 S.Ct. 1885. A state law will violate the Commerce Clause if it forces differential treatment of in-state and out-of-state economic interests that benefits the former while burdening the latter. *Id.* at 472, 125 S.Ct. 1885.

After the Twenty-first Amendment was adopted, the United States Supreme Court appeared to support the

view that, when alcohol was involved, the amendment gave states the authority to discriminate against out-of-state goods. *Id.* at 484-485, 125 S.Ct. 1885. However, this view has been abandoned, and it is now clear that the Twenty-first Amendment does not give states the right to pass discriminatory laws in the area. The state regulation of alcohol, like other articles in interstate commerce, is limited by the Commerce Clause. *Id.* at 487, 125 S.Ct. 1885.

MCL 436.1205(3) is Subject to Strict Scrutiny

The Commerce Clause problem with MCL 436.1205(3) is not straightforward. To appreciate the magnitude of the constitutional issue, it is necessary to understand the law's effects.

MCL 436.1205(3) creates two categories of ADAs: (1) ADAs that were wholesaling wine before September 24, 1996 (the favored class) and (2) ADAs that were not (the disfavored class). The two classes are treated differently but, within each class, every ADA is treated the same. At first blush, treating ADAs differently depending on whether they were in the wholesaling business on a certain date would seem not to create a Commerce Clause issue. It is only when one considers that solely Michigan companies were able to wholesale wine before September 24, 1996,[10] that the constitutional problem comes into focus.

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[10] *See* MCL 436.1601. The constitutionality of the residency requirement is not at issue. Justice Markman finds this to be a determinative factor. It is not. MCL 436.1205(3) locks in place a system that discriminates in favor of local commerce. Plaintiffs can challenge

(Continued on following page)

Because only Michigan companies could sell wine wholesale in Michigan before September 24, 1996, the favored class contains only Michigan companies. The members of this class are given a distinct advantage over all other ADAs. The reason is that only they can act as wine wholesalers and distributors in areas where a preexisting wholesale agreement exists.[11] By giving a class of Michigan companies this advantage, the law creates a system where out-of-state ADAs can never compete on the same terms as the favored class of Michigan ADAs. When a state statute discriminates against interstate commerce by favoring in-state economic interests over out-of-state interests, it is subject to strict scrutiny. *Brown-Forman Distillers Corp.*, 476 U.S. at 578, 106 S.Ct. 2080. Because this law favors in-state entities over out-of-state entities, it can survive only if it can withstand strict scrutiny.[12]

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the effects of MCL 436.1205(3) without challenging the residency requirement.

[11] An ADA that was selling alcohol wholesale in Michigan before September 24, 1996, can continue to sell all the brands of wine in the state that it was selling on that date. One that was not can sell brands of wine wholesale only in areas where there is not a preexisting wholesale agreement for those brands. By September 24, 1996, every brand of wine sold in Michigan had been assigned to a wholesaler. Ninety-seven percent of the brands sold today in Michigan were being sold then. Thus, there are very few brands sold today for which there was not a preexisting wholesale agreement on September 24, 1996. Consequently, it is almost impossible for ADAs that were not selling here before that date to compete effectively in the market. Also, ADAs that can participate in this market are able to develop cost savings that they can pass on to suppliers. Obviously, ADAs that cannot develop these cost savings have a much harder time competing with ADAs that can.

[12] When more than one wholesaler sells the same brand of wine in the same area it is known as "dualing." In finding MCL 436.1205(3) constitutional, Justice Markman relies on the fact that an out-of-state

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To survive strict scrutiny, the state must demonstrate that the law in question actually furthers the purported legitimate state interest, and no less discriminatory means exist to accomplish this interest. *New Energy Co. of Indiana v. Limbach,* 486 U.S. 269, 278, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988). Intervening defendant Michigan Beer & Wine Wholesalers Association claims that the purpose of this statute is to protect existing wine wholesalers from ADAs that might desire to become wine wholesalers. It argues that this protection is needed because, without it, ADA wholesalers would have a built-in advantage over non-ADA wholesalers and could gobble up the market.

Assuming this is a legitimate purpose, there is a less discriminatory way to accomplish it. The Legislature could ban all ADAs, not just those that began wholesaling after September 24, 1996, from wholesaling brands of wine in areas where there is a preexisting wholesale agreement covering them.[13] Because this law is not narrowly tailored

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company could "dual" if it acquired, purchased, or merged with a company that "dualed" before September 24, 1996. *Ante* at 235. The fact that a hypothetical situation can be envisioned where the statute could be constitutionally applied does not save the statute from a constitutional challenge. *See Brown-Forman Distillers Corp.,* 476 U.S. at 579, 106 S.Ct. 2080. ("When a state statute directly regulates or discriminates against interstate commerce, or when its *effect* is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.") (emphasis added).

Justice Markman also refers to the possibility that the Twenty-first Amendment may authorize the discrimination at issue. *Ante* at 237. The state regulation of alcohol is limited by the Commerce Clause the same as state regulation of any other article in interstate commerce. *Heald,* 544 U.S. at 487, 125 S.Ct. 1885.

[13] At least two Michigan companies that were wholesalers as of September 24, 1996 have become ADAs. They handle approximately 70

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to achieve the government's interest, it is invalid and must be struck down.[14]

Conclusion

MCL 436.1205(3) locks in place a system that provides an advantage to a class of Michigan companies that no out-of-state company will ever be able to match. For this reason, it violates the Commerce Clause of the United States Constitution and should be struck down. I dissent from the order denying plaintiffs' motion for reconsideration. I would grant the motion and reverse the judgment of the Court of Appeals.

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percent of the wholesale business in the state. If the Legislature was concerned about unfair competition from ADAs, this question arises: Why did it include a loophole that allows two companies representing 70 percent of the market to become ADAs and continue to wholesale every brand of wine they sold before September 24, 1996?

[14] The defendants have argued that there can be no Commerce Clause violation because the disfavored class created by this law also contains Michigan companies. This is irrelevant and does not erase the discriminatory effect. The fact that a statute favors one class of in-state entities over another does not mitigate its burden on interstate commerce. *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353, 357-358, 112 S.Ct. 2019, 119 L.Ed.2d 139 (1992).

723 N.W.2d 834

Supreme Court of Michigan.
NATIONAL WINE & SPIRITS, INC.,
NWS Michigan, Inc., and National Wine & Spirits, L.L.C.,
Plaintiffs-Appellants,
v.
STATE of Michigan, Defendant-Appellee,
andMichigan Beer & Wine Wholesalers Association,
Intervening Defendant-Appellee.
Docket No. 126121.
COA No. 243524.

Nov. 29, 2006.

On order of the Court, leave to appeal having been granted and the case having been briefed and argued by counsel, the order of January 20, 2006 which granted leave to appeal is VACATED and leave to appeal is DENIED because we are no longer persuaded the questions presented should be reviewed by this Court.

MICHAEL F. CAVANAGH, J., dissents and states as follows:

I respectfully disagree with the majority's determination that leave to appeal was improvidently granted in this case. The issues are jurisprudentially significant and far-reaching. I further note that this Court heard oral argument on the application and then chose to issue an order granting leave to appeal and requiring full briefing and oral argument. After considering arguments on the issues *twice,* I believe that this Court should issue an opinion on the merits of the issues presented.

MARILYN J. KELLY, J., joins the statement of MICHAEL F. CAVANAGH, J.

WEAVER, J., dissents and states as follows:

I dissent from the majority's decision that leave to appeal was improvidently granted. I would remand this case to the Court of Appeals for reconsideration in light of *Granholm v. Heald,* 544 U.S. 460, 125 S.Ct. 1885, 161 L.Ed.2d 796 (2005).

The statute at issue, MCL 436.1205(3),[1] while perhaps not unconstitutional on its face, as applied, forever prohibits an out-of-state business from operating as both an authorized distribution agent of spirits and as a distributor of wine. Michigan distributors of wine in operation before September 24, 1996, on the other hand, were permitted to also become authorized distribution agents of spirits (ADAs). As a result, § 205(3) precludes out-of-state

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[1] Section 205(3), in pertinent part, is set forth below:

> After September 24, 1996, an authorized distribution agent or an applicant to become an authorized distribution agent who directly or indirectly becomes licensed subsequently as a wholesaler shall not be appointed to sell a brand of wine in a county or part of a county for which a wholesaler has been appointed to sell that brand under an agreement required by this act. A wholesaler who directly or indirectly becomes an authorized distribution agent shall not sell or be appointed to sell a brand of wine to a retailer in a county or part of a county for which another wholesaler has been appointed to sell that brand under an agreement required by this act, unless that wholesaler was appointed to sell and was actively selling that brand to retailers in that county or part of that county prior to September 24, 1996, or unless the sale and appointment is the result of an acquisition, purchase, or merger with the existing wholesaler who was selling that brand to a retailer in that county or part of that county prior to September 24, 1996.

distributors from achieving the benefits of a combined cost economy.[2]

In addition, § 205(3) prohibits any distributors established after September 24, 1996, from selling or distributing a brand of wine in an area where an established distributor has already been assigned or authorized to sell that particular brand of wine.[3] Thus, those Michigan distributors established before 1996 enjoy the competitive advantage of being able to sell certain brands exclusively, and to also act as authorized distribution agents of both spirits and wine.

It is undisputed that before September 24, 1996, only Michigan businesses were licensed as wine wholesalers in the State of Michigan. Consequently, when § 205(3) was enacted, only existing Michigan wine distributors retained the benefit of distributing all the wine brands they sold as before September 24, 1996. Conversely, no out-of-state wine distributor could achieve the same benefit, nor could any out-of-state distributor ever enjoy the cost savings of becoming a distributor of both wine and spirits.

The United States Supreme Court's decision in *Granholm* had not been released at the time the Court of

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[2] For example, when a Michigan distributor operating as both an ADA of spirits and as a wine distributor delivers spirits and wine to retailers on the same truck, it can lower its delivery costs. However, under § 205(3), out-of-state distributors cannot conserve costs by loading wine and spirits on the same truck.

[3] Before September 24, 1996, Michigan wine distributors were not prohibited from "dualing," a concept whereby a wine distributor could compete with other distributors in a particular area and sell the same competing brands of wine. After September 24, 1996, only those wine distributors established in Michigan before that date could continue "dualing."

Appeals decided this case. Had the Court of Appeals had the benefit of the United States Supreme Court's ruling in *Granholm,* it may very well have concluded that the burden on interstate commerce imposed by § 205(3) outweighs the state's objective in preserving the existing three-tier alcohol distribution system.[4] As the United States Supreme Court noted in *Granholm,* protectionist state legislation that provides a competitive advantage to intrastate commerce is subject to attack under the Commerce Clause:

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[4] The traditional Commerce Clause test was discussed by the United States Supreme Court in *Brown-Forman Distillers Corp. v. New York State Liquor Auth.,* 476 U.S. 573, 578-579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986):

> This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. See, *e.g., Philadelphia v. New Jersey,* 437 U.S. 617, 98 S.Ct. 2531, 57 L.Ed.2d 475 (1978); *Shafer v. Farmers Grain Co.,* 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909 (1925); *Edgar v. MITE Corp.,* 457 U.S. 624, 640-643, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) (plurality opinion). When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). We have also recognized that there is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity. See *Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429, 440-441, 98 S.Ct. 787, 54 L.Ed.2d 664 (1978).

Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). See also *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988). This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States. *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 539, 69 S.Ct. 657, 93 L.Ed. 865 (1949). States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U.S. 322, 325-326, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979). [*Granholm* at 472, 125 S.Ct. 1885.]

Given the constitutional implications posed by the application of § 205(3), and given the United States Supreme Court's mandate against differential treatment of out-of-state economic interests, a remand to the Court of Appeals for reconsideration in light of *Granholm* would be the most judicious resolution of this case.

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708 N.W.2d 111

Supreme Court of Michigan.
NATIONAL WINE & SPIRITS, INC.,
NWS Michigan, Inc., and National Wine & Spirits, L.L.C.,
Plaintiffs-Appellants,
v.
STATE of Michigan, Defendant-Appellee, and
Michigan Beer & Wine Wholesalers Association,
Intervening Defendant-Appellee.
Docket No. 126121.
COA No. 243524.

Jan. 20, 2006.

On January 11, 2006, the Court heard oral argument on the application for leave to appeal the March 25, 2004 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is GRANTED.

Persons or groups interested in the determination of the questions presented in this case may move the Court for permission to file briefs amicus curiae.

690 N.W.2d 99 (Table)

Supreme Court of Michigan
National Wine & Spirits, Inc., NWS Michigan, Inc.,
National Wine & Spirits, L.L.C.
v.
State, Michigan Beer & Wine Wholesalers Association
NO. 126121. COA No. 243524.

December 27, 2004

Disposition: On order of the Court, the application for leave to appeal the March 25, 2004 judgment of the Court of Appeals is considered and, it appearing to this Court that the case of *Granholm v. Heald*, ___ U.S. ___, 124 S.Ct. 2389, 158 L.Ed.2d 962 (2004) is pending before the United States Supreme Court and that the decision in that case may resolve an issue raised in the present application for leave to appeal, we ORDER that the application be held in ABEYANCE pending the decision in that case.

M.C.L.A. 436.1205. Authorized distribution agents for spirits; specially designated distributors; payment of per-case offset to vendors of spirits

Sec. 205. (1) If the commission privatizes any portion of the system existing on December 19, 1996 under which spirits are warehoused or distributed, the commission shall, as provided in section 203(1)[1], by order appoint authorized distribution agents to engage in the warehousing and delivery of spirits in this state so as to ensure that all retail licensees continue to be properly serviced with spirits. An authorized distribution agent is subject to uniform requirements, including business operating procedures, that the commission may prescribe by rule, subject to this section.

(2) A person is eligible for appointment by the commission as an authorized distribution agent if the following circumstances exist:

(a) The person satisfies all applicable commission rules prescribing qualifications for licensure promulgated under section 215[2].

(b) The person has entered into a written agreement or contract with a supplier of spirits for the purposes of warehousing and delivering a brand or brands of spirits of that supplier of spirits.

(c) The person has an adequate warehousing facility located in this state for the storing of spirits from which all delivery of spirits to retail licensees shall be made.

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[1] M.C.L.A. § 436.1203.

[2] M.C.L.A. § 436.1215.

(3) An authorized distribution agent shall not have a direct or indirect interest in a supplier of spirits or in a retailer. A supplier of spirits or a retailer shall not have a direct or indirect interest in an authorized distribution agent. An authorized distribution agent shall not hold title to spirits. After September 24, 1996, an authorized distribution agent or an applicant to become an authorized distribution agent who directly or indirectly becomes licensed subsequently as a wholesaler shall not be appointed to sell a brand of wine in a county or part of a county for which a wholesaler has been appointed to sell that brand under an agreement required by this act. A wholesaler who directly or indirectly becomes an authorized distribution agent shall not sell or be appointed to sell a brand of wine to a retailer in a county or part of a county for which another wholesaler has been appointed to sell that brand under an agreement required by this act, unless that wholesaler was appointed to sell and was actively selling that brand to retailers in that county or part of that county prior to September 24, 1996, or unless the sale and appointment is the result of an acquisition, purchase, or merger with the existing wholesaler who was selling that brand to a retailer in that county or part of that county prior to September 24, 1996.

(4) An authorized distribution agent shall deliver to each retailer located in its assigned distribution area on at least a weekly basis if the order meets the minimum requirements. Except that in those weeks that accompany a state holiday, the commission may order a modified delivery schedule provided that a retailer waits not longer than 9 days between deliveries due to a modified delivery

schedule. Until the system established by the commission under section 206[3] is activated, the authorized distribution agent shall provide retailers access to a computer application that includes the capability to determine whether certain spirits are currently available for delivery. Beginning on the date the system is established by the commission under section 206, the commission shall provide for an integrated on-line ordering system for spirits and shall require the continuance of any ordering system in existence on the effective date of section 206. The minimum requirements shall be set by the commission and shall be a sufficient number of bottles to comprise not more than 2 cases. A retailer may pick up the product at the authorized distribution agent's warehouse. To avoid occasional emergency outages of spirits, a retail licensee may make up to 12 special emergency orders to an authorized distribution agent per calendar year which order shall be made available to the retail licensee within 18 hours of the placing of the order. A special emergency order placed on Saturday or Sunday shall be made available to the retail licensee before noon on the following Monday. An authorized distribution agent may impose a fee of up to $20.00 to deliver a special emergency order to a retail licensee.

(5) In locations inaccessible to a motor vehicle as that term is defined by the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, the authorized distribution agent shall arrange that a delivery of spirits to a retailer be in compliance with the following procedures:

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[3] M.C.L.A. § 436.1206.

(a) After processing an order from a retailer, an authorized distribution agent shall contact a retailer to confirm the quantity of cases or bottles, or both, and the exact dollar total of the order.

(b) The authorized distribution agent shall have the responsibility to coordinate with the retailer the date and time a driver is scheduled to deliver the order to a ferry transport dock, shall arrange any ferry, drayage, or other appropriate service, and shall pick up the retailer's payment at that time.

(c) The ferry transport company or company representing any other form of conveyance shall take the retailer's payment to the mainland dock and give that payment to the authorized distribution agent's driver.

(d) The ferry transport company or company representing any other form of conveyance shall transport the order to the drayage or other appropriate company at the island dock for immediate delivery to the retailer.

(e) The drayage or other appropriate company shall deliver the order to the retailer.

(6) The authorized distribution agent is responsible for the payment of all transportation and delivery charges imposed by the ferry, drayage, or other conveyance company and is responsible for all breakage and any shortages, whether attributable to the ferry, drayage, or other conveyance company or any combination of those companies, until the order is delivered to the retailer's establishment. This subsection does not in any way prevent the authorized distribution agent from seeking reimbursement

or damages from any company conveying the authorized distribution agent's product.

(7) Except as otherwise provided in subsection (4), an authorized distribution agent shall not charge a delivery fee or a split-case fee for delivery of spirits sold by the commission to a retailer.

(8) An authorized distribution agent or prospective authorized distribution agent shall maintain and make available to the commission or its representatives, upon notice, any contract or written agreement it may have with a supplier of spirits or other authorized distribution agent for the warehousing and delivery of spirits in this state.

(9) For any violation of this act, rules promulgated under this act, or the terms of an order appointing an authorized distribution agent, an authorized distribution agent shall be subject to the suspension, revocation, forfeiture, and penalty provisions of sections 903(1) and 907[4] in the same manner in which a licensee would be subject to those provisions. An authorized distribution agent aggrieved by a penalty imposed by the commission may invoke the hearing and appeal procedures of section 903(2) and rules promulgated under that section.

(10) A specially designated distributor may sell to an on-premises licensee up to 9 liters of spirits during any 1-month period and an on-premises licensee may purchase, collectively from specially designated distributors, up to that amount during any 1-month period. Notwithstanding any other provision of this act or rule promulgated under

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[4] M.C.L.A. § 436.1903 and 436.1907.

this act, a specially designated distributor is only liable for knowingly violating this section. Records verifying these purchases shall be maintained by the on-premises licensee and be available to the commission upon request.

(11) An authorized distribution agent shall demonstrate that it has made a good faith effort to provide employment to those former state employees who were terminated due to the privatization of the liquor distribution system. A good faith effort is demonstrated by the authorized distribution agent performing at least the following actions:

(a) Seeking from the commission a list of names and resumes of all such former state employees who have indicated a desire for continued employment in the distribution of liquor in Michigan.

(b) Providing a list of employment opportunities created by the authorized distribution agent in the distribution of liquor in Michigan to each individual whose name and resume is transmitted from the commission.

(c) Providing an opportunity for application and interview to any terminated state worker who indicates an interest in pursuing a job opportunity with the authorized distribution agent.

(d) Providing a priority in hiring for those individuals who apply and interview under this process.

(12) Any former state employees terminated due to privatization who have reason to believe that an authorized distribution agent has not made a good faith effort to provide him or her with employment opportunities as

described in subsection (11) may file a complaint with the commission who shall hear the complaint and make a determination on its validity. If the commission determines that the complaint is valid, the violation may be treated as a violation of this act and the authorized distribution agent may be subject to the suspension, revocation, forfeiture, and penalty provisions of sections 903(1) and 907.

(13) In addition to paying a vendor of spirits the acquisition price for purchasing spirits, the commission may pay a vendor of spirits an additional amount of not less than $4.50 and not more than $7.50 for each case of spirits purchased as an offset to the costs being incurred by that vendor of spirits in contracting with an authorized distribution agent for the warehousing and delivery of spirits to retailers. The payment described in this subsection shall not be included in the cost of purchasing spirits by the commission and shall not be subject to the commission's markup, special taxes, or state sales tax. The per-case offset established by this subsection may be increased by the state administrative board each January to reflect reasonable increases in the authorized distribution agent's cost of warehousing and delivery. As used in this subsection, "case" means a container holding twelve 750 ml bottles of spirits or other containers containing spirits which are standard to the industry.

M.C.L.A. 436.1601. Wholesale licensees or applicants; corporations, partnerships, limited partnerships; licensing

Sec. 601. (1) A wholesale licensee or an applicant for a wholesale license, if an individual, shall be licensed only if that individual has resided in this state for not less than 1 year immediately prior to the date of issuance of the license.

(2) A wholesale licensee or an applicant for a wholesale license, if a partnership other than a limited partnership, shall be licensed only if all of its members have resided in this state for not less than 1 year immediately prior to the date of issuance of the license.

(3) A wholesale licensee or an applicant for a wholesale license, if a limited partnership, shall be licensed only if the limited partnership is authorized to do business under the laws of this state, and if the general partner and all limited partners have resided in this state for not less than 1 year immediately preceding the date of issuance of the license. If the general partner is a corporation, the limited partnership shall be licensed only if the corporation has been authorized to do business under the laws of this state for not less than 1 year immediately preceding the date on which the corporation obtained an interest in the limited partnership. A limited partnership that holds a wholesale license shall not admit as a new limited partner an individual who has not resided in this state for at least 1 year immediately preceding the date on which the limited partnership interest was acquired by the individual.

(4) A wholesale licensee or an applicant for a wholesale license, if a corporation, shall be licensed only if the

corporation is authorized to do business under the laws of this state and if all stockholders of the corporation have resided in this state for not less than 1 year immediately preceding the date of issuance of the license. A corporation that holds a wholesale license shall not issue shares of the corporation's stock to a person who has not resided in this state for at least 1 year immediately preceding the date on which the corporate stock was acquired by the person.

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

NATIONAL WINE & SPIRITS, INC.,
NWS MICHIGAN, INC., and
NATIONAL WINE & SPIRITS, L.L.C. Case No. 02-13-CZ

Plaintiffs,

v

STATE OF MICHIGAN,

Defendant.

MILLER, CANFIELD, PADDOCK
AND STONE, PLC
Sherry L. Katz-Crank (P40500)
Louis B. Reinwasser (P37757)
Attorneys for Plaintiffs
One Michigan Avenue, Suite 900
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(517)487-2070

THERE IS NO OTHER PENDING OR RESOLVED CIVIL ACTION ARISING OUT OF THE TRANSACTION OR OCCURRENCE ALLEGED IN THE COMPLAINT

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs National Wine & Spirits, Inc., NWS Michigan, Inc. and National Wine & Spirits, L.L.C., by and through their attorneys, Miller, Canfield, Paddock and Stone, P.L.C., bring the following Complaint seeking a declaratory judgment.

PARTIES

1. National Wine & Spirits, Inc. is an Indiana corporation with its principal place of business in Indianapolis, Indiana.

2. NWS Michigan, Inc. is a wholly owned subsidiary of National Wine & Spirits, Inc.

3. NWS Michigan, Inc. became incorporated in Michigan on October 21, 1996 and became an Authorized Distribution Agent of spirits for the State of Michigan on or about December 22, 1996.

4. National Wine & Spirits, L.L.C. is also a wholly owned subsidiary of National Wine & Spirits, Inc.

5. National Wine & Spirits, L.L.C. became incorporated in Michigan on December 21, 1998 and became a licensed wine wholesaler in the State of Michigan on or about November 12, 1999.

6. Defendant is the State of Michigan.

JURISDICTION

7. This Court has jurisdiction of this request for a declaratory judgment pursuant to MCR 2.605.

MICHIGAN LIQUOR CONTROL ACT OF 1933

8. Following the repeal of prohibition, the Michigan Legislature enacted the Michigan Liquor Control Act of 1933 ("1933 Act").

9. The 1933 Act provided the statutory authority for comprehensive regulation of alcoholic beverage sales and distribution in Michigan.

10. Under the 1933 Act, there were no private distributors of spirits in the State of Michigan.

11. Under the 1933 Act, the State itself, through the Liquor Control Commission ("Commission"), purchased spirits from suppliers, maintained the product in warehouses owned or leased by the State, and sold the product to licensed retail outlets, both on-premise and off-premise.

12. Under the 1933 Act, the State of Michigan was referred to as a "control" state.

PRIVATIZATION OF SPIRITS WAREHOUSING AND DISTRIBUTION

13. Sixty-three years later, the State ended its direct role in warehousing and distribution functions for spirit products, and substituted one or more Authorized Distribution Agents ("ADAs").

14. The transition from a State owned and operated warehousing and delivery system to a privatized system with Commission oversight occurred during late 1996 and early 1997.

15. The State of Michigan sought and received assistance from National Wine & Spirits, Inc. with respect to privatizing spirits distribution in Michigan.

16. National Wine & Spirits, Inc. was able to provide such assistance to the State because of its extensive experience with spirits distribution.

17. As of 1996, National Wine & Spirits, Inc. was the largest distributor of spirits in Indiana and one of the largest distributors of spirits in Illinois.

18. National Wine & Spirits, Inc. has invested approximately $25 million in the State of Michigan for the creation of a system of warehousing and delivery for spirits.

19. National Wine & Spirits, Inc. created a wholly owned subsidiary (NWS Michigan, Inc.) for purposes of spirits distribution in Michigan and NWS Michigan, Inc. became incorporated in Michigan on October 21, 1996.

20. NWS Michigan, Inc. became an ADA for the State of Michigan on or about December 22, 1996.

21. As part of the privatization efforts, NWS Michigan, Inc. extended offers for employment to 116 of the former Commission employees, 94 of whom accepted employment.

22. In its capacity as an ADA, during the last five years NWS Michigan, Inc. has warehoused and delivered more than 13 million cases of spirits to retailers in the State of Michigan.

MICHIGAN LIQUOR CONTROL CODE OF 1998

23. Shortly after the warehousing and distribution of spirits were privatized, the Michigan Legislature enacted the Michigan Liquor Control Code of 1998 ("1998 Code") MCLA 436.1101 *et. seq.*,

24. When the State enacted the 1998 Code, a number of eligibility and operational restrictions were imposed upon ADAs. *See* MCLA 436.1205.

25. At the time the Michigan Legislature enacted the 1998 Code, in-state ADAs knew that NWS Michigan, Inc. was the largest ADA in Michigan and that NWS Michigan, Inc. was the wholly owned subsidiary of an out-of-state company, National Wine & Spirits, Inc.

26. In-state ADAs encouraged the Michigan Legislature to enact legislation that would effectively exclude out-of-state ADAs from serving in the dual role of an ADA of spirits and as a licensed wholesaler of wine.

27. As part of the 1998 Code, the Michigan Legislature did include a provision which restricts whether a company can serve as both an ADA of spirits and a licensed wine wholesaler in the State of Michigan.

28. In particular, Section 205(3) of the 1998 Code prohibits an ADA from selling or distributing a brand of wine in an area in which a wholesaler has already been assigned or authorized to sell or distribute that brand of wine ("prohibition against dualing"). *See* MCLA 436.1205(3).

29. The prohibition against dualing in Section 205(3) of the 1998 Code does not apply to an ADA who was licensed as a wine wholesaler on or before September 24, 1996. MCLA 436.1205(3).

30. On September 24, 1996, only in-state companies were licensed as wine wholesalers in the State of Michigan.

31. The prohibition against dualing in Section 205(3) of the 1998 Code effectively prohibits all out-of-state companies from serving as both an ADA of spirits and a licensed wholesaler of wine in Michigan.

32. The prohibition against dualing in Section 205(3) of the 1998 Code is in conflict with other sections of the 1998 Code which indicate that wine suppliers "may grant the right to sell a specified brand or brands in a sales territory to more than 1 wholesaler." *See* MCLA 436.1307(1).

SECTION 205(3) EFFECTIVELY PROHIBITS PLAINTIFFS' ENTRY INTO WINE WHOLESALING MARKET

33. National Wine & Spirits, Inc. created a wholly owned subsidiary (National Wine & Spirits, L.L.C.) in order to enter the wine wholesaling business in Michigan.

34. National Wine & Spirits, L.L.C. obtained a wine wholesaling license on November 12, 1999.

35. National Wine & Spirits, L.L.C. wishes to sell and/or distribute brands of wine in areas for which another wholesaler has been assigned or authorized to sell or distribute those brands under agreements with wine suppliers.

36. Section 205(3) of the 1998 Code prohibits National Wine & Spirits, L.L.C. from selling or distributing a brand of wine in an area for which a wholesaler has been assigned or authorized to sell or distribute that brand of wine under an agreement with a wine supplier because National Wine & Spirits, L.L.C. obtained its wine wholesaling license after September 24, 1996. *See* MCL 436.1205(3).

37. National Wine & Spirits, Inc. and National Wine & Spirits, L.L.C. have lost substantial revenue by not being permitted to sell and distribute wine in the State of Michigan.

SECTION 205(3) EFFECTIVELY PROHIBITS PLAINTIFFS FROM DEVELOPING AND SHARING DUAL ROLE COST ECONOMIES

38. Companies that were licensed as wine wholesalers prior to September 24, 1996 can become ADAs of spirits.

39. Some companies that were licensed as wine wholesalers prior to September 24, 1996 have become ADAs of spirits.

40. Companies that serve as licensed wine wholesalers and ADAs of spirits are able to and have developed cost economies as a result of their dual role ("dual role cost economies").

41. One such dual role cost economy is developed when a company delivers spirits and wine to retailers on the same truck.

42. Companies that serve as licensed wine wholesalers and ADAs of spirits are able to and do share with their suppliers the dual role cost economies.

43. Plaintiffs and other out-of-state companies are unable to develop or share with their suppliers dual role cost economies because § 205(3) of the 1998 Code prohibits them from serving in a dual role.

44. Section 205(3) of the 1998 Code was passed in an attempt to give an economic advantage to those involved in wine wholesaling at an arbitrary date as against all those who enter the wine wholesaling business after that date.

45. Section 205(3) of the 1998 Code was passed in an attempt to give an economic advantage to in-state

companies involved in wine wholesaling as against out-of-state companies who subsequently enter the wine wholesaling business.

46. Plaintiffs have lost substantial revenue because a number of their suppliers have cancelled contracts and have switched to in-state companies that are permitted to develop and share dual role cost economies.

47. Plaintiffs' $25 million investment in the State of Michigan is at substantial risk because of their inability to compete on a level playing field with in-state companies.

COUNT I: SECTION 205(3) DENIES EQUAL PROTECTION

48. Plaintiffs incorporate paragraphs 1 through 47 above into Count I.

49. The equal protection clauses of the United States Constitution and the Michigan Constitution guarantee every citizen that he or she will be treated equally under the law. *See* U.S.C.A. Const. Amend. 14, § 1; M.C.L.A. Const. 1963, art. 1, § 2.

50. Section 205(3) of the 1998 Code creates two classes of distributors in the State of Michigan: (1) ADAs such as the Plaintiffs who cannot sell or distribute wine in certain areas of the state because they were not selling or distributing wine in those areas before September 24, 1996; and (2) ADAs who can also sell and distribute wine in areas even though another wholesaler has been assigned or authorized to sell or distribute that brand of wine, merely because this second category of ADAs were selling or distributing that brand of wine in that area prior to September 24, 1996.

51. Section 205(3) of the 1998 Code gives unfair economic advantages to companies who were selling and/or distributing wine prior to September 24, 1996, and those advantages are not available to other companies such as Plaintiffs.

52. On its face, Section 205(3) of the 1998 Code denies equal protection of the laws. *See* U.S.C.A. Const. Amend. 14, § 1; M.C.L.A. Const. 1963, art. 1, § 2.

53. As applied to Plaintiffs, Section 205(3) of the 1998 Code denies equal protection of the laws. *See* U.S.C.A. Const. Amend. 14, § 1; M.C.L.A. Const. 1963, art. 1, § 2.

COUNT II: SECTION 205(3) VIOLATES COMMERCE CLAUSE

54. Plaintiffs incorporate paragraphs 1 through 53 above into Count II.

55. The dormant commerce clause of the United States Constitution limits the authority of states to interfere with interstate commerce. *See* U.S.C.A. Cost. Art. 1, § 8, cl. 3.

56. Because Section 205(3) of the 1998 Code precludes ADAs from selling or distributing wine in certain areas of the state if they did not do so before September 24, 1996, and given that prior to September 24, 1996 no out-of-state companies were selling and/or distributing wine in Michigan, the practical effect of Section 205(3) was and is to preclude out-of-state ADAs from also acting as sellers and/or distributors of wine in Michigan, while allowing in-state ADAs to also act as sellers and/or distributors of wine.

57. Section 205(3) of the 1998 Code favors local ADAs who are also sellers and/or distributors of wine, by erecting barriers to competition from out-of-state ADAs who cannot also act as sellers and/or distributors of wine in certain areas of the state because they did not do so before September 24, 1996.

58. Section 205(3) of the 1998 Code gives an unfair economic advantage to in-state companies involved in wine wholesaling as against out-of-state companies.

59. Section 205(3) of the 1998 Code unduly and substantially burdens interstate commerce.

60. On its face, Section 205(3) of the 1998 Code violates the dormant Commerce Clause of the United States Constitution. *See* U.S.C.A. Const. art. 1, § 8, cl. 3.

61. As applied to Plaintiffs and other out-of-state companies, Section 205(3) of the 1998 Code violates the dormant commerce clause of the United States Constitution. *See* U.S.C.A. Const. art. 1, § 8, cl. 3.

WHEREFORE, Plaintiffs National Wine & Spirits, Inc., National Wine & Spirits, L.L.C. and NWS Michigan, Inc. respectfully request that this Court declare that Section 205(3) of the 1998 Code is unconstitutional and of no force and effect.

Respectfully submitted,

MILLER, CANFIELD,
PADDOCK AND STONE, P.L.C.

DATED: January 5, 2002

BY: /s/ Sherry L. Katz-Crank
Sherry L. Katz-Crank (P40500)
Attorney for Plaintiffs

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

NATIONAL WINE & SPIRITS, INC., NWS MICHIGAN, INC., and NATIONAL WINE & SPIRITS, L.L.C.,

Plaintiffs,

v

STATE OF MICHIGAN,

Defendant

Case No. 02-13-CZ

Hon.Lawrence M. Glazer

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AFFIDAVIT OF GREGORY J. MAULOFF

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

Gregory J. Mauloff states the following under oath:

1. I am the Corporate Vice President of Sales and Marketing for NWS Michigan, Inc. ("NWS"). I have first-hand knowledge of the facts set forth in this affidavit unless otherwise noted, and am competent and authorized by Plaintiffs to attest to those facts.

2. Based on my knowledge of the wine wholesale market in Michigan, I would estimate that the two Michigan ADA/wholesalers, TransCon and General Wine & Liquor Company, handled 70% of the wine market in Michigan on September 24, 1996. I would further estimate that that percentage has increased since 1996.

3. I would also estimate that, because NWS cannot wholesale wines that it did not wholesale on September 24, 1996, it is limited to selling no more than 3% of the brands of wine now being sold in Michigan. With this limitation, there is no way that NWS can be competitive with those ADA/wholesalers who can sell new brands of wine as well as all the brands they were selling on September 24, 1996.

/s/ Gregory J. Mauloff
Gergory J. Mauloff

Subscribed and sworn to before me
this 7 day of August, 2002.

/s/ Suzanne M. Tokanski

Notary Public, Wayne County,
Michigan

My Commission Expires: SUZANNE M. TOKANSKI
Notary Public Wayne County MI
My Commission Expires [Illegible]

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

NATIONAL WINE & SPIRITS, INC., NWS MICHIGAN, INC., and NATIONAL WINE & SPIRITS, LLC, Plaintiff -vs- STATE OF MICHIGAN, Defendant.	File No. 02-13-CZ

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE LAWRENCE M. GLAZER

Lansing, Michigan – May 8, 2002

APPEARANCES:

For the Plaintiff: Miller, Canfield, Paddock & Stone
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Lansing, MI 48933

For the Defendant: Department of Attorney General
BY: Howard E. Goldberg (P14095)
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Willingham & Cote
Mr. Anthony S. Kogut
333 Albert Avenue
Suite 500
East Lansing, MI 48823

* * *

[19] It's certainly not a basis for saying, well, we're going to, you know, pass this law that's going to apply to everyone in the future but you get to keep what you've already got. That's clearly – clearly violates the requirements of equal protection.

THE COURT: Okay.

MR. REINWASSER: Thank you, Your Honor.

THE COURT: Thank you. Well, I have to say that in my mind it's a close question as to whether this is what we would call a legitimate grandfather clause versus the creation of a closed or frozen class, which by definition violates equal protection. But I think that I have to step back and use the analysis, which I don't think anyone really disputes, the analysis provided for in the case law regarding equal protection cases involving social and economic legislation.

I think everyone agrees that the first question to be answered is whether this classification serves as a legitimate – whether the state had a legitimate purpose in mind. Whether this classification serves that purpose is the second question.

I think it's pretty much indisputable that the purpose of preserving an orderly and stable wholesale wine distribution network and yet one which provides for some form of competition is a legitimate state interest [20] given that the regulation of alcoholic beverages is of constitutional magnitude in Michigan, as I think it is in most states.

So we come to the second question, does this classification rationally serve that purpose, or, is this classification arguably rationally related to that purpose. A statute is presumed to be constitutional and the Plaintiffs bear a

very heavy burden, and I think in this case they come close. They don't quite make that burden, don't quite shoulder that burden. Until this amendment was enacted in 1996 wine wholesalers in Michigan, and indeed all alcoholic beverage industry businesses in Michigan, lived in a world without ADAs. An ADA is a creature intended in most respects to take the place of direct action by the State of Michigan and its employees. So in a sense the ADA is a surrogate for the State of Michigan, and it is paid directly by the State of Michigan.

I think it's also undisputed that for an ADA to also be in the wine wholesaler business is a pretty good economic advantage, particularly when we have competing wholesalers in the same district wholesaling the same brand of wine, so to prevent that very specific and narrow economic disadvantage from being created by privatization, the legislature enacted this amendment, [21] and I think I cannot say that this amendment is not rationally related to that purpose.

Now, coming full circle to my original approach to this, which is, is this a legitimate grandfather clause? The sense that I get of legitimate grandfather clauses is that they are created when a regulated business or profession is subjected to greater regulation than it was before and it is felt to be unfair to subject those individuals who have already spent time and money preparing or investing the capital necessary to meet the old requirements, it is unfair to submit to – require them to submit to these new requirements when as a matter of course over a period of time they will die out. And that's the case here, because these wine wholesalers who were wholesaling a particular brand of wine on a non-exclusive basis in a particular territory before this amendment were doing so, as I say, in

a world without ADAs, and once you introduce the ADA into the equation, it becomes a completely different world. And yet they made these investments over the years, and they may not all be hard capital, hard goods, they may be relationships, but still they cost money and time and effort to create those ongoing relationships, and I think the legislature can legitimately take the position that it's not fair to [22] strip them of that in this new regulatory climate created by the introduction of privatization. So, in so many words, I will deny summary disposition to the Plaintiffs.

Does everyone agree that this also requires me to grant summary disposition to the Defendants so you can now go right to the Court of Appeals, or do you feel you may have some factual issues?

MR. REINWASSER: Your Honor, there is the other aspect of this which is the commerce clause count that we have which is entirely separate from the protection clause. This motion was brought on for equal protection.

THE COURT: You have another summary disposition motion on C(8) on the commerce clause?

MR. REINWASSER: There's no other motion. The complaint includes a count for a breach of commerce clause.

THE COURT: But if that's strictly a legal issue, why didn't you include it in this motion?

MR. REINWASSER: We think there are potential fact issues, and I say potential fact issues with regard to the commerce clause. I think it was pointed out by the Defendants in their briefs as well –

THE COURT: Well, you folks can argue about [23] all of that another day. I'll simply deny summary disposition to the Plaintiffs.

MR. REINWASSER: Thank you, Your Honor.

THE COURT: And ask Mr. Kogut to prepare an order and circulate it. Thank you.

MR. REINWASSER: Thank you, Your Honor.

MR. KOGUT: Thank you, Your Honor.

(Whereupon hearing concluded at 2:56 P.M.

* * *

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

NATIONAL WINE & SPIRITS, INC., NWS MICHIGAN, INC., and NATIONAL WINE & SPIRITS, LLC, Plaintiff -vs- STATE OF MICHIGAN, Defendant.	File No. 02-13-CZ

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE LAWRENCE M. GLAZER

Lansing, Michigan – August 14, 2002

APPEARANCES:

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For Defendant:
Department of Attorney General
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Willingham & Cote
Mr. Anthony S. Kogut
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Suite 500
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* * *

[138a] THE COURT: Thank you. First with respect to the equal protection issue, I agree with the Defendants that the decision which I made previously indenying Plaintiff's motion for summary disposition on equal protection grounds, that that decision [139a] requires that summary disposition be granted to Defendants on that count. I have already ruled that there is a rational relationship between this statute and a legitimate purpose. The only new argument which the Plaintiff brings today on that issue is that the statute as applied may raise some factual issues – or I should say there may be some factual issues as to the statute as applied and how it works in real life. I don't perceive, however, that there is any question as to how the statute has applied to the Plaintiff. I don't think there's any dispute at all about that, and that's really what's at issue in this case, and so I don't see any reason to delay until there can be some evidentiary hearing to make some factual ruling on equal protection. On equal protection, count one, the motion is granted.

Now, as to the issues that are discussed in most of the arguments today, Plaintiff in so many words keeps referring to, quote, what everyone knew, close quote, when this legislation was enacted, and it seems to me that Plaintiff confuses this, what everyone knew, with the idea or the concept of legislative intent as it is used in our case law. The case law allows the Court to attempt to discern something which is called legislative intent, that's [140a] true, but that something which is called legislative intent has nothing to do with anyone's version or idea of what was in the minds of individual legislators as to their motivation for enacting a particular statute. Indeed, Justice Scalia of the U.S. Supreme Court in perhaps the

only written expression that he's ever-created that I found myself in agreement with once wrote an opinion which I thought pretty clearly demonstrated the futility of attempting to discern the true motives behind the entire legislature all the way down to any one legislator who voted for or against a particular measure, and he concluded in that opinion that it's just as likely as not that the motive was to get even with some other legislator who did him wrong ten years ago. Based on my experience I think, as I say, Justice Scalia's conclusion was plausible. You just cannot make that kind of a judgment from a Court, nor does the law authorize the Court to make that kind of a judgment.

The phrase legislative intent as it is used in our case law, and as far as I know case law everywhere in the United States, refers to a concept which is used by the courts when a particular statute's application to a particular situation is ambiguous. The courts then use a number of techniques [141a] to attempt to discern what the legislature intended that statute to mean in that particular situation. That has nothing to do with the request that the Plaintiffs are making that this Court attempt to discern the motivation, the true motivation in the hearts of the legislators who enacted this statute. That's just beyond the power of this Court.

So we come to the question of the commerce clause and the 21st Amendment. The parties have engaged in a good deal of argument about the interrelationship between those two, and I think that the case law allows them to do that because the case law creates a rather ill-defined area in which the 21st Amendment's so-called core purpose is indeed allowed to have preeminence.

In the Hostetter case the U.S. Supreme Court wrote, and I quote, Since the 21st Amendment, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause, close quote. In fact, in that quote they are quoting a case which originated in Michigan, Indianapolis Brewing Company versus Liquor Commission, 305 US 391. The Court goes on to write, quote, This view of the scope of the 21st Amendment with respect to a state's power to restrict, regulate, [142a] or prevent the traffic and distribution of intoxicants within its borders has remained unquestioned, close quote. And they then cite a number of other Supreme Court cases from which they derived that generalization. So I don't think there's much room for dispute that where the so-called core powers referred to, in the 21st Amendment, are implicated, that the state's action cannot be limited by the commerce clause, and in this case I think those core powers are implicated. This statute clearly, unequivocally creates a particular form of regulation, and restriction with respect to the distribution of alcoholic beverages, wines, and spirits. A particular scheme is created in this act.

Now, I understand the Plaintiff's argument, that because they were not participating at the cut off date they became forever ineligible to be grandfathered, and that they are an out-of-state firm. I understand that argument, and certainly the statute appears to have that effect, but it has that effect on any entity, any institution, any company that would have been in the same position as the Plaintiff. It doesn't single out the Plaintiff and it doesn't single out out-of-state companies. That just happens to be the way it was at the time the statute [143a] was enacted, and I understand that it may be the Plaintiff's belief that

this statute was the result of the mustering of a certain number of legislators in favor of interests that wanted Plaintiff kept out of this state, I understand that argument, but as I said, that is not the kind of argument that can be the basis of an opinion of a Court. The Court – the statute is facially neutral. The statute does not in its own terms discriminate in any way between out-of-state and in-state entities, and the statute is clearly intended to execute the powers that are referred to in the 21st Amendment, and, therefore, on count two Defendant is also entitled to summary disposition. I'll accept an order to that effect. Thank you.

* * *